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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. –

IN THE

Supreme Court of the United States

EDWARD E. DUNLEAVY
and EDWARD R. MOORE,

Petitioners,

---v.---

FARAWAY FARM, LLC, JEFFERSON COUNTY BOARD OF ZONING APPEALS, THOMAS TRUMBLE, JEFF BREESE, and TIFFANY HINE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WEST VIRGINIA
SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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September 9, 2008

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Questions Presented

I. Have the parties to an action been deprived of fundamental due process where an appellate court decides a matter on the merits after first concluding that the original tribunal lacked subject matter jurisdiction?

II. Is fundamental due process violated where an appellate court directs a non-party to execute its decision on the merits where it has no subject matter jurisdiction over the case before it?

List of Parties and Rule 29.6 Statement

The parties to the proceedings before the West Virginia Supreme Court of Appeals were petitioners Edward E. Dunleavy and Edward R. Moore and respondents Faraway Farm, LLC, the Jefferson County Board of Zoning Appeals, Thomas Trumble, member, Jeff Breese, member, and Tiffany Hine, chairperson.

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Petitioners Edward E. Dunleavy and Edward R. Moore ("Dunleavy and Moore") respectfully petition for a writ of certiorari to review the April 17, 2008, decision of the West Virginia Supreme Court of Appeals.

Opinions Below

The decision of the West Virginia Supreme Court of Appeals (A1-A21) is not yet reported, but appears at *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals, et al.*, No. 33438 (W.Va., 2008). The order of the Circuit Court of Jefferson County (A22-A64) upholding the Board of Zoning Appeals decision is an unreported order. The decision of the Jefferson County Board of Zoning Appeals (A65-A69) denying the conditional use permit sought by Far Away Farm, LLC, is an unreported decision.

Jurisdiction

The West Virginia Supreme Court of Appeals entered its decision on April 17, 2008, and denied the petitioners' Petition for Rehearing by order entered on June 11, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

Constitutional and Statutory Provisions Involved

U. S. Constitution, Amendment XIV, Section 1, is set out in the appendix hereto at pages A71.

Statement of the Case

The West Virginia Supreme Court of Appeals ("WVSCA") ruled that the Jefferson County Board of Zoning Appeals ("BZA") lacked subject matter jurisdiction to have heard and decided the conditional use permit application sought by Far Away Farm, LLC ("FAF"), and accordingly declared the BZA's decision to be void as a matter of law. The WVSCA ruled that the Jefferson County "Planning and Zoning Commission"[1] was the body having jurisdiction, but did not remand for referral of the matter to that body for hearing and decision. Instead, the WVSCA decided on its own initiative that FAF was entitled to the conditional use permit ("CUP"), and ordered the Planning Commission to issue it. The Planning Commission was not a participant at any stage of the proceedings, and the WVSCA had never acquired *in personam* jurisdiction over it.

This decision of the WVSCA raises basic yet significant questions of the right of citizens to fundamental due process.

A. Proceedings before the BZA

Pursuant to the Jefferson County Zoning and Development Review Ordinance ("the Ordinance"), FAF, on June 24, 2004, applied for a CUP to develop

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[1] No body of that name exists. The body to which the WVSCA referred is legally established as the Jefferson County Planning Commission. It erroneously is referred to in some provisions of the local ordinance as the "Zoning and Planning Commission," the likely source of the WVSCA's misnomer.

152 residential sites on a 122.88-acre parcel located in the Rural Zone. A CUP can only be granted upon a showing that the development proposal satisfies the requirements of the Ordinance and is compatible with the surrounding neighborhood. This showing is made through a multi-step process culminating in a quasi-judicial administrative hearing.

The BZA conducted the hearing on FAF's application for the CUP on July 26, 2005. Dunleavy and Moore[2] appeared in opposition to the application. FAF raised no jurisdictional objection to the BZA's proceeding in the matter, even though its counsel had actual knowledge that the Ordinance had been amended, effective April 8, 2005, which amendments transferred initial authority to hear and decide CUPs from the Planning Commission to the BZA.[3] At no time did FAF move for transfer of the matter to the Planning Commission. In fact, FAF argued to the BZA that it was required to apply the amended provisions to the CUP application.

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[2] As neighboring landowners, Dunleavy and Moore established their standing in the matter of the CUP. *See, e.g.*, Syl. Pt. 6, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). Dunleavy and Moore also are the President and Vice-President, respectively, of the Shepherdstown Battlefield Preservation Association, Inc., and also represented its interests in the proceedings below.

[3] Prior to the hearing on FAF's application for a CUP, FAF's counsel had initiated a facial challenge to the amendments for another entity. FAF's counsel attached a copy of the minutes of the adoption of the amendments to the petition in the other case, demonstrating their actual knowledge thereof.

The BZA received substantial evidence in the matter from FAF, from Dunleavy and Moore and from other persons. At the close of evidence, the BZA denied the CUP. A65-A69. The BZA based its decision on the inadequacy of the public road and the incompatibility of the proposed development density with the surrounding neighborhood.

B. Proceedings before the Circuit Court

FAF sought and was granted review, on *certiorari,* of the BZA's denial of the CUP in the Circuit Court of Jefferson County, West Virginia ("the circuit court"). The parties submitted extensive briefs, but at no time in the circuit court did FAF assert that the BZA had lacked jurisdiction to hear and decide the CUP application. Applying the requisite deferential standard of review, the circuit court entered an order on September 18, 2006, upholding the decision of the BZA on FAF's appeal.[4] A22-A64.

C. Proceedings and Opinion in the WVSCA

FAF sought and was granted review of the circuit court's decision, on *certiorari,* in the West Virginia Supreme Court of Appeals.

In its *per curiam* decision, A1-A21, the WVSCA held that the BZA lacked subject matter

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[4] The circuit court's order jointly addressed FAF's appeal of the denial of the CUP, and Dunleavy and Moore's appeal of the BZA's decision on other issues. The Dunleavy and Moore appeal is not at issue herein, as they did not pursue appeal to the WVSCA.

jurisdiction pursuant to the provisions of the Ordinance, and that, therefore, its decision denying the conditional use permit was "void as a matter of law." A17. The Court then proceeded, "upon further review of the record" in the case, A17, to decide the CUP application on the merits, concluding that it should be granted. Finally, the Court ordered the Planning Commission, which had not participated at any stage of the proceedings in the matter and was not a party before the Court, to issue the CUP to FAF. A21.

The WVSCA's decision was persuaded by a late assertion of error by FAF. After the writ of *certiorari* had been granted, FAF asserted a new issue. In its opening brief, FAF asserted that because the BZA had applied the amended provisions to its hearing of the CUP application, it had constructively rewritten the Ordinance, thus exceeding its jurisdiction. As explanation for its late assertion, FAF claimed that it had only just discovered the minutes of adoption of the April, 2005 amendments to the Ordinance, which made the amendments applicable only to CUP applications filed after the effective date.[5]

It was not until the oral arguments before the WVSCA that FAF clearly asserted for the first time that the BZA lacked subject matter jurisdiction *ab initio*, and that jurisdiction over the CUP was instead vested in the Planning Commission. FAF

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[5] Dunleavy and Moore moved to supplement the record to rebut the assertion by FAF that the minutes of adoption were newly discovered. *See*, fn. 3, *supra*. The WVSCA denied the motion.

argued that the case should not, however, be remanded to the Planning Commission for hearing and decision because the Planning Commission would likely deny the CUP application, too.[6] Dunleavy and Moore contested these arguments, as did the BZA, and urged that remand for referral to the Planning Commission was the proper disposition if the court decided that the BZA had acted without jurisdiction.

Following the announcement of the WVSCA's decision, Dunleavy and Moore timely filed a Petition for Rehearing in which they had the first opportunity to fully argue the federal constitutional issues presented herein. A74-A93. Dunleavy and Moore argued that if the BZA lacked subject matter jurisdiction *ab initio* in the matter, then its entire proceedings were *coram non judice*, such that there was no record on which the WVSCA could have decided the matter on the merits. Moreover, the WVSCA could only act in the case pursuant to its appellate jurisdiction because it lacked original jurisdiction and could not decide the matter on the merits in the first instance, especially in the absence of an evidentiary record. Dunleavy and Moore further argued that, in such circumstances, the failure to remand the matter to the proper forum deprived them of fundamental due process by denying them a hearing in a tribunal of competent jurisdiction. Moreover, because the WVSCA had not acquired personal jurisdiction over the Planning

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[6] This argument was curious given that one of FAF's assignments of error was that the BZA had violated due process requirements by providing an inadequate opportunity for the presentation of evidence.

Commission, its order directing the Commission to issue the CUP also was void as *coram non judice.*

The BZA also filed a Petition for Rehearing making similar arguments. A94-A100. The WVSCA, by Order dated June 11, 2008, summarily denied both Petitions. A70.

Reasons for Granting the Petition

Because it summarily refused the petitions for rehearing without discussion, the West Virginia Supreme Court of Appeals let pass its only opportunity to decide the questions presented herein. Its April 17, 2008, decision in the case stands in direct contravention of the clear and long-standing decisions of this Court that establish the rules of law applicable to the questions presented. The questions presented by the petitioners are of constitutional magnitude, and involve the most fundamental rights of due process. The violation of those rights by the decision of the WVSCA is so patently obvious as to warrant summary reversal.

The fundamental rights of due process are the foundation upon which our system of law and governance is built. When the WVSCA, or, indeed, any court, refuses to afford these foundational rights, the matter becomes one of systemic offense that transcends the importance, or lack of importance, of the issues in the underlying case. The protection of all citizens from such intrusion upon their rights is never a matter of small importance, and is an undertaking in which the exercise of this Court's jurisdiction is properly invoked and particularly needed.

I. The WVSCA's Decision Deprives the Petitioners of a Hearing and Decision in a Court of Competent Jurisdiction

It is an unassailable principle, universally acknowledged since the early decisions of this Court, that the essential elements of due process of law in civil and criminal cases are that the parties have notice and the opportunity to be heard by a tribunal of competent jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878); *Twining v. State of New Jersey*, 211 U.S. 78, 110-111 (1908), *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Richards v. Jefferson Co., Alabama*, 517 U.S. 793, 797 at n. 4 (1996). "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas Ag. v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

Established law of such longevity cannot have escaped the notice of the highest court of West Virginia. Indeed, it has long been acknowledged and enforced in the historic case law of the State, also. *See, e.g., Campbell v. Wyant*, 26 W.Va. 702, 707 (1885)(due process is "only upon a hearing of the parties in a court of competent jurisdiction.").

There can be no dispute that due process may be satisfied by the opportunity to be heard before an administrative or quasi-judicial tribunal. *Pittsburgh C. C. & St. L. Ry. Co. v. Backus*, 154 U.S. 421, 426-427 (1894); *Hodge v. Muscatine Co.*, 196 U.S. 276, 281-282 (1905). Just as a court must be competent in a cause, however, an administrative tribunal also

must be vested with jurisdiction over the subject matter to satisfy due process.

Where a tribunal lacks subject matter jurisdiction over the cause, judicial authority is not present and no judicial proceeding occurs, a concept "embodied in the phrase *coram non judice.*" *Burnham v. Superior Court,* 495 U.S. 604, 608-609 (1990). "[S]ubject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived," *United States* v. *Cotton,* 535 U.S. 625, 630 (2002), and "[n]o amount of judicial discretion" can supply it. *Ex parte Bradley,* 74 U.S. (7 Wall.) 364 (1869). In the absence of subject matter jurisdiction, any proceeding is *coram non judice* and void, *Id.*, as is any judgment rendered by the tribunal. *Ex parte Burrus,* 136 U.S. 586, 597 (1890); *In re Sawyer,* 124 U.S. 200, 220-222 (1888). It is as if nothing was done.

When a court determines that it is without subject matter jurisdiction, or has been divested of jurisdiction, its only authority is to dismiss the case, anything else done being *coram non judice. Nat. Steam-Ship Co. v. Tugman,* 106 U.S. 118 (1882); *Mayor v. Cooper,* 73 U.S. 247, 250 (1867). Because a proceeding that is *coram non judice* is no proceeding at all, this Court has observed that, on appeal it may not even consider a record developed after the lower court was divested of jurisdiction. *O'Connell v. U.S.,* 253 U.S. 142, 147 (1920)(a bill of exceptions admitted after the close of the court's term could not be considered on appeal).

The principal of *coram non judice* is one familiar to the law of West Virginia. Syl. Pt. 4, *Cobb*

v. Cobb, 145 W.Va. 107, 113 S.E.2d 193 (1960)("When it becomes apparent ... that a court is without jurisdiction, the court has no authority but to dismiss the proceeding, anything further being coram non judice."). *In accord, Nutter v. Brown,* 58 W.Va. 237, 245, 52 S.E. 88 (1905); *Twiggs v. Chevallie,* 4 W.Va. 463, 473 (1870). "[I]t is well settled by the decisions of this court ... that the proceedings and judgments of courts [lacking jurisdiction] are absolutely void and of no effect, and must be regarded as if nothing had been done. ... [T]he entire proceedings become and remain *coram non judice* and void." *State v. Valentine,* 90 W.Va. 35, 38, 110 S.E. 445, 446 (1922). *See, also,* Syl. Pt. 4, *Farber v. Mazzone,* 213 W.Va. 661, 584 S.E.2d 517 (2003).

In the instant case, the WVSCA's sole authority to act was pursuant to its appellate jurisdiction, which, by legislative enactment, includes the power to review the final judgments of circuit courts entered upon review, on *certiorari,* of quasi-judicial zoning decisions. W.Va. Constitution, Art. VIII, § 3; W.Va. Code § 8A-9-7. When the court decided that the BZA lacked subject matter to have heard and decided the CUP, the concomitant requisite conclusion was that the proceedings had and the decision rendered by the BZA were null and void as *coram non judice.*

At that moment, there was no decision and no record to review within the limitations of WVSCA's appellate jurisdiction. There certainly was no record upon which the WVSCA could have decided the case on the merits. The only options available to the WVSCA was a dismissal of the action, or a remand

with directions that the matter be referred to the Planning Commission, the body which the WVSCA held to have original jurisdiction over the CUP application, for an original hearing.

Because the WVSCA failed to either dismiss or remand the matter, the petitioners have been deprived of the opportunity to be heard by a tribunal of competent jurisdiction, in violation of their rights of due process under the Fourteenth Amendment to the U.S. Constitution.

II. The WVSCA's Order Directing the Planning Commission to Execute its Decision is Void

"[T]he judgment of a court lacking personal jurisdiction violate[s] the Due Process Clause of the Fourteenth Amendment," *Pennoyer*, 95 U.S. at 733, and, under the common law principle of *coram non judice,* is void. *See, Burnham*, 495 U.S. at 608-609. "[O]ne is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U. S. 32, 40 (1940). *See, also, Taylor v. Sturgell,* No. 07-371 (U.S. 2008); *Martin v. Wilks,* 490 U.S. 755, 761-762 (1989); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

There are few exceptions to the rule that judgments are not binding on nonparties. *Taylor*, No. 07-371 at 10-13 (discussing six exceptions in the context of preclusion). Most notably, a nonparty can be bound to a judgment where there is privity with a party to the case, *Richards*, 517 U.S. at 798, where

the nonparty participates in concert with a party, *Zenith Radio Corp.* 395 U.S. at 112, or where the nonparty's interests have been adequately represented by a party with the same interests, as in a representative action of which the nonparty has notice. *Hansberry,* 311 U.S. at 41-42. *See, also, Taylor,* No. 07-371 (U.S. 2008); *Richards,* 517 U.S. 793.

The Planning Commission was not a participant in the case at any stage, and the WVSCA never acquired personal jurisdiction over it. The Planning Commission was not given notice in the case because it was an entity without interest in the proceedings. The Planning Commission did not become interested until the WVSCA ordered it to issue the CUP.

None of the exceptions to personal jurisdiction apply to the Planning Commission. Because the Planning Commission did not have an interest in the case until the issuance of the WVSCA's decision,[7] it cannot be said that its interests were adequately represented in the matter. It is impossible to know what position the Planning Commission would have taken if it had heard and decided the CUP instead of the BZA.[8] To say that its interests would have been the same as those of any party is pure speculation.

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[7] By the time the Planning Commission became interested, therefore, it was too late for it to intervene in the proceedings to protect its own interests.

[8] The Planning Commission could have granted the CUP in the first instance. It could have denied the CUP on other grounds. It could have granted the CUP only with the imposition of any number of conditions that in its judgment were necessary to insure neighborhood compatibility. The possibilities are many.

The Planning Commission is not an entity in privity with the BZA , nor does it act in concert with the BZA. While both are administrative bodies established by the county commission, each serves a separate and distinct function in local land use regulation. *Singer v. Davenport,* 164 W.Va. 665, 672, 264 S.E.2d 637, 642 (1980). As a safeguard to this separation, State law provides that no member of a board of zoning appeals can also be a member of a planning commission. W.Va. Code § 8A-8-4.

The WVSCA did not acquire personal jurisdiction over the Planning Commission in this matter, without with which it could not, within the confines of due process, order the Planning Commission to execute its decision in the case. Moreover, as discussed above, the WVSCA itself lacked subject matter jurisdiction to decide the matter on the merits. Its order directing the Planning Commission to issue the CUP is *coram non judice* and void.

Because the Planning Commission was not a party to the appeal before the WVSCA, it is unable to assert its own objections to the order by means of a direct appeal to this Court. *Marino v. Ortiz,* 484 U.S. 301, 304 (1988). The Planning Commission may be able to challenge the ruling in a separate action, *see, e.g., Martin v. Wilks*, 490 U.S. 755,[9] but it

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[9] Upon being advised of the WVSCA order at its July meeting, the Planning Commission directed its own counsel to advise it of its legal options at the August meeting. At the August meeting, the Commission, voicing strong objections to the mandate, voted to pursue available legal options for challenge. (The minutes of the August meeting are not yet available, as

is by no means certain that its ability to do so would not be impaired by jurisprudential rules and doctrines other than an assertion of preclusion. As a result, absent review on certiorari by this Court, the WVSCA's unlawful order to the Planning Commission, which is void for lack of both subject matter and personal jurisdiction, could be insulated from the reversal that is warranted on the due process grounds discussed herein.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 9, 2008

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they will not be approved and entered until the September meeting.)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 Term

No. 33438

FAR AWAY FARM, LLC,
Petitioner Below, Appellant

v.

JEFFERSON COUNTY BOARD OF ZONING APPEALS, A PUBLIC BODY, THOMAS TRUMBLE, MEMBER, JEFF BRESEE, MEMBER, AND TIFFANY HINE, CHAIR,
Respondents Below, Appellees

Appeal from the Circuit Court of Jefferson County
Honorable Thomas W. Steptoe, Jr., Judge
Civil Action No. 05-C-332

REVERSED

Submitted: March 11, 2008
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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syllabus Point 5, *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975).

2. 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. Pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.*, 166 W.Va. 775, 277 S.E.2d 613 (1981)." Syllabus Point 3, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003).

3. "'While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable.' Syl. Pt. 5, *Hodge v. Ginsberg*, 172 W.Va. 17, 303 S.E.2d 245 (1983)." Syllabus Point 4, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003).

4. "Lack of jurisdiction may be raised for the first time in this court, when it appears on the face of the bill and proceedings, and it may be taken notice of by this court on its own motion." Syllabus Point 3, *Charleston Apartments Corp. v. Appalachian Elec. Power Co.*, 118 W.Va. 694, 192 S.E. 294 (1937).

5. "The rules for construing statutes also apply to the interpretation of municipal ordinances." Syllabus Point 1, *in part, Town of Burnsville v. Kwik-Pik, Inc.*, 185 W.Va. 696, 408 S.E.2d 646 (1991).

6. "A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute." Syllabus Point 3, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Jefferson County entered on September 18, 2006. In that order, the circuit court affirmed a decision of the appellee and respondent below, the Jefferson County Board of Zoning Appeals (hereinafter "BZA"),[1] which denied the request of the appellant and petitioner below, Far Away Farm, LLC (hereinafter "FAF"), for a conditional use permit (hereinafter "permit") for the purpose of subdividing and developing 122.88 acres in a designated rural district of Jefferson County, West Virginia. In this appeal, FAF contends that the BZA applied the wrong version of the applicable zoning ordinance; that the BZA failed to consider all three standards set forth in the ordinance for determining whether a permit should be granted; that the BZA was plainly wrong in its factual findings; and that the BZA denied it due process.

Having considered the petition for appeal, the entire record, the briefs and argument of counsel, and the pertinent authorities, we reverse the final order and refer this matter back to the Jefferson County Planning and Zoning Commission with directions to issue the permit to FAF.

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[1] Thomas Trumble and Jeff Bresee, members of the BZA, and Tiffany Hine, Chair of the BZA, were also named as respondents below and are appellees in this appeal.

I.

FACTS

FAF seeks to develop property located in a rural district of Jefferson County, West Virginia. Specifically, FAF's proposal involves dividing 122.88 acres into 152 new home lots, with a ten-acre lot for an existing farmhouse and six acres for a trail and park. Each new home lot would be approximately one-third to one-fifth of an acre. The Jefferson County Zoning and Land Development Ordinance (hereinafter "the Ordinance") does not allow a residential subdivision in a rural district unless the developer is granted a permit through the Development Review System (hereinafter "DRS"). Thus, FAF filed an application for a permit on June 23, 2004.

Upon receipt of the permit application, the Zoning Administrator, Paul Raco, completed a Land Evaluation and Site Assessment (hereinafter "LESA"). Basically, LESA is a numerical rating system used to evaluate the potential of the site in terms of the soil and amenities. The Soils Assessment evaluates the parcel for development based on the soil types it possesses while the Amenities Assessment looks at the site's agricultural viability and its development potential. If the proposed development receives a passing LESA score, the permit application moves onto the next stage of the DRS which is the compatibility assessment meeting. In this case, FAF received a passing LESA score. However, certain community

members, Edward E. Dunleavy[2] and Edward R. Moore[3] (hereinafter collectively referred to as "Dunleavy"), disagreed with the LESA score received by FAF and appealed that decision to the BZA. Upon review, the BZA modified the LESA score, but it remained sufficient for the application to move to the next stage of the DRS.

A compatibility assessment meeting was then held in April 2005. At the meeting, which lasted seven hours, FAF presented its development plan and members of the public were allowed to raise compatibility concerns about the project. In total, 106 "compatibility issues" were raised. Thereafter, FAF agreed to modify its development plans to satisfy thirty-nine of the issues.

A public hearing before the BZA was held on July 26, 2005, to discuss the sixty-seven issues that remained unresolved. FAF submitted a thirty-page memorandum addressing each issue as well as additional documentation consisting of approximately 320 pages supporting its position. The BZA allotted FAF thirty minutes to make its presentation and fifteen minutes for rebuttal. Individuals were given fifteen minutes to address the BZA and groups were allotted five minutes. FAF contended that its development was compatible with the character and nature of the land as well as the

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[2] Edward Dunleavy is a resident and president of the homeowners' association of a nearby residential development known as Trough Bend. Trough Bend consists of seven lots, each of which are approximately eight to eleven plus acres in size.

[3] Edward Moore owns 73.42 acres of land immediately adjacent to the FAF property.

community because it would consist of single-family homes with a fifty-foot buffer around the whole property. FAF maintained that its development would not create a significant amount of traffic and noted that it would include an old farmhouse and park. Members of the public asserted that the roads were too narrow for a school bus and the increased traffic that would result from the development. The public also noted the historical significance of the area claiming that it was the site of a civil war battle.[4] At the conclusion of the meeting, the BZA decided to meet on August 9, 2005, to make a decision on the permit application.

At the August 9, 2005, meeting, the BZA concluded that the development as proposed was too dense to be compatible with the surrounding neighborhood, noting that the average lot size in the area was 14.56 acres. The BZA also concluded that the roads were inadequate to deal with the increased traffic that would result from the development. Accordingly, FAF's permit application was denied.

FAF then filed an appeal with the circuit court. Dunleavy also filed an appeal with regard to the LESA score. The cases were consolidated, and on September 18, 2006, the circuit court issued an

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[4] FAF contends that there is no proof of this claim but rather, there is evidence that the Battle of Sheperdstown occurred near the river which is about one mile away. Regardless, FAF notes that the circuit court properly ruled that it is exempt from the Ordinance's definition of a historic site as it has never been listed on the West Virginia or National Register of Historic Places

order affirming the BZA's decisions. This appeal followed.[5]

II.

STANDARD OF REVIEW

In this case, we are presented with an appeal of a circuit court order which affirmed the decision of an administrative agency, the BZA. It is well-established that "[o]n appeal, this Court reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency." *Webb v. West Virginia Board of Medicine*, 212 W.Va. 149, 155, 569 S.E.2d 225, 231 (2002). With respect to decisions of a board of zoning appeals, this Court has held that, "While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syllabus Point 5, *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975).

This Court has also held that, "'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. Pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.*, 166 W.Va. 775,

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[5] FAF does not challenge the circuit court's decision with respect to the LESA score and Dunleavy did not appeal the decision either. Therefore, the LESA score is not an issue before this Court.

277 S.E.2d 613 (1981)." Syllabus Point 3, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003). "'While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable.' Syl. Pt. 5, *Hodge v. Ginsberg*, 172 W.Va. 17, 303 S.E.2d 245 (1983)." Syllabus Point 4, *Corliss*. With these standards in mind, we proceed to consider the parties' arguments.

III.

DISCUSSION

FAF first contends that the BZA erroneously applied the Ordinance as amended on April 8, 2005, to its permit application. FAF points out that the Jefferson County Commission approved amendments to the Ordinance on March 23, 2005. Those amendments did not become effective until April 8, 2005. When the amendments were adopted, the Jefferson County Commission indicated that applications for a permit that were filed before the effective date of the amendments were "grandfathered" and the former version of the Ordinance would apply.[6] Therefore, because it requested a permit on June 23, 2004, FAF maintains that the April 8, 2005 amendments were not applicable.

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[6] FAF says that it did not discover this ruling by the Jefferson County Commission until after its petition for appeal had been filed.

In response, the BZA and Dunleavy[7] contend that FAF has waived its right to argue that the wrong version of the Ordinance was applied to its permit application because the issue was not raised before the BZA or the circuit court. In support of this argument, the BZA cites Syllabus Point 4 of *State v. Browning*, 199 W.Va. 417, 485 S.E.2d 1 (1997), which provides that, "This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record." The BZA and Dunleavy note that counsel for FAF was involved in the amendment process and thus, assert that FAF had constructive and/or actual knowledge of the amendments as they were approved by the Jefferson County Commission. Because FAF never raised this issue before the BZA or the circuit court, the BZA and Dunleavy reason that the alleged error was not properly preserved and therefore, the issue has been waived.

The BZA and Dunleavy further contend that the County Commission's decision to "grandfather" permit applications submitted prior to the April 8, 2005 amendments only pertained to the requisite LESA score. In other words, the BZA and Dunleavy argue that applications pending at the time of the amendments were required to satisfy all aspects of the Ordinance as amended with the exception of the new LESA scoring system which changed the LESA score needed to advance to the compatibility assessment meeting. Thus, the BZA and Dunleavy

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[7] As noted earlier, Dunleavy appealed the BZA's decision with respect to the LESA score to the circuit court. The circuit court consolidated Dunleavy's appeal with FAF's appeal of the BZA's decision denying the permit. Dunleavy has participated in this appeal as an appellee

conclude that there is no merit to FAF's contention that the April 8, 2005 amendments did not apply to its permit application.[8]

As noted by the BZA and Dunleavy, we generally do not consider arguments raised for the first time on appeal. Syllabus Point 4, *Browning, supra. See also State v. Marple*, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996) ("It is a fundamental proposition of law that an appellate court generally will not entertain an alleged trial error unless it has been properly preserved at trial."); *State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114, 128 (1995), quoting *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir.1994) (en banc), *cert. denied*, 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995) ("'One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court will result' in the imposition of a procedural bar to an appeal of that issue."). However,"'[l]ack of jurisdiction of the subject matter may be raised in any appropriate manner . . . and at any time during the pendency of the suit or action'" *McKinley v. Queen*,

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[8] Dunleavy also argues that the amendments only collected and clarified the criteria that had been scattered throughout the previous version of the Ordinance and therefore, even if the BZA erred by referring to the amended Ordinance, the error was harmless as the analysis and outcome would have been the same under the former Ordinance. We disagree. Having reviewed the two ordinances, we find that substantial changes were made. The amendments included specific criteria for determining whether a permit should be issued and furthermore, the initial body charged with deciding whether or not the permit should be issued was changed from the Planning Commission to the BZA. Thus, we find no merit to this argument.

125 W.Va. 619, 625, 25 S.E.2d 763, 766 (1943) (citation omitted). In fact, this Court has held that "[l]ack of jurisdiction may be raised for the first time in this court, when it appears on the face of the bill and proceedings, and it may be taken notice of by this court on its own motion." Syllabus Point 3, *Charleston Apartments Corp. v. Appalachian Elec. Power Co.*, 118 W.Va. 694, 192 S.E. 294 (1937). We have explained that "[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void." *State ex rel. Termnet Merchant Services, Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E2d 209, 213 (2005) *citing* Syllabus Point 5, *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958), *rev'd on other grounds, Patterson v. Patterson*, 167 W.Va. 1, 277 S.E.2d 709 (1981).

Having reviewed the former Ordinance and the amended Ordinance,[9] we find that the issue of which Ordinance applied to FAF's application for a permit is properly before the court because it is a jurisdictional matter. In that regard, our review of the former Ordinance revealed that prior to the April 8, 2005 amendments, the BZA was not authorized to make the initial decision to either issue or deny the

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[9] During the pendency of this appeal, FAF filed a motion to supplement the record with a copy of the former Ordinance that was in effect at the time it filed the permit application as well as a certified copy of the March 23, 2005 meeting minutes of the Jefferson County Commission. Subsequently, the parties signed a stipulation and the record was supplemented with copies of the former Ordinance and the amended Ordinance. This Court has taken judicial notice of the March 23, 2005 meeting minutes of the Jefferson County Commission.

permit. Rather, Section 7.6(g) of the former Ordinance provided:

> The Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit. The Planning and Zoning Commission shall have the authority over the issue or denial of all development review applications.

Section 7.6(h) of the former Ordinance stated:

> Any person may appeal any decision of the Planning and Zoning Commission regarding the issuance or denial of the Conditional Use Permit to the Board of [Zoning] Appeals pursuant to Article 8.

Finally, Section 7.6(i) of the former Ordinance provided:

> Any person may appeal any decision of the Board of [Zoning] Appeals to the Circuit Court of Jefferson County subject to Article 8, Chapter 24, Subsection 59, of the West Virginia Code, as amended.

Thus, if the former Ordinance applied to the permit application submitted by FAF, the BZA was without jurisdiction to deny the permit in the first instance, and, consequently, its decision would be void as a matter of law. *Jordan, supra.* Accordingly, we must now determine which version of the Ordinance applied to FAF's request for a permit.

As discussed above, the Jefferson County Commission voted to amend the Ordinance at its meeting on March 23, 2005. The minutes from that meeting indicate that the following occurred:

> Paul Raco appeared before the Commission to discuss the Zoning Ordinance Amendments. After discussion, amended motion by Morgan, second by Tabb to approve the March 17th 2005 draft of the Zoning Ordinance Amendments as presented with an effective date of April 8, 2005 with the changes asked by Commissioner Tabb to include the following: Motion carried.
>
> Take out secondary
>
> Take out substantial way
>
> Motion by Tabb, second by Manuel, for administrative purposes to recognize that all applications in the Office of Planning Zoning and Engineering received on and before the closing business of April 8, 2005, which address all the necessary 23 questions on the application be grandfathered in, and that applications received after April 8, 2005 comply with the new amendments. Motion carried.

It is clear from these minutes that the Jefferson County Commission intended for the amendments to the Ordinance to take effect on April 8, 2005, and that any permit application completed prior to that date would be considered under the provisions of the former Ordinance. Because FAF requested a permit on June 23, 2004, and completed the necessary documentation prior to April 8, 2005, we find that the former Ordinance was applicable.

The BZA simply had no authority to apply the amended Ordinance to FAF's application for a permit. Long ago, this Court observed that "a zoning appeals board is simply 'an administrative agency, acting in a quasi-judicial capacity.'" *Wolfe v. Forbes*, 159 W.Va. 34, 45, 217 S.E.2d 899, 906 (1975) (citation omitted). We explained that, "A board of zoning appeals is not a law-making body and, consequently, has no power to amend the zoning ordinance under which it functions." *Id.* Likewise, a board of zoning appeals does not have the power to determine the effective date of an amendment to a zoning ordinance. That power belongs to the law-making body which in this instance is the Jefferson County Commission.

This Court has recognized that, "The rules for construing statutes also apply to the interpretation of municipal ordinances." Syllabus Point 1, *in part, Town of Burnsville v. Kwik-Pik, Inc.*, 185 W.Va. 696, 408 S.E.2d 646 (1991). Also, this Court has long held that, "A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute." Syllabus Point 3, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980). See also *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 335, 480 S.E.2d 538, 544 (1996) (a deeply rooted principle in our jurisprudence is that absent some clear signal from the Legislature, a statute will not apply retroactively). Based on the meeting minutes, it is clear that the Jefferson County Commission intended that the Ordinance as amended on April 8, 2005, be applied prospectively. Consequently, those

amendments were not applicable to FAF's application for a permit.

We reject the BZA's assertion that applications pending when the amended Ordinance took effect were only "grandfathered" with respect to the LESA score requirements. This argument is not supported by the meeting minutes of the Jefferson County Commission or any provision in either the former or amended Ordinance. In sum, we find that the Ordinance as amended on April 8, 2005, should not have been applied to the request for a permit submitted by FAF on June 23, 2004. Because the former Ordinance was applicable, the BZA did not have the authority to decide whether to issue or deny the permit. Consequently, its decision to deny FAF the permit is void as a matter of law and the decision of the circuit court must be reversed.

Upon further review of the record in this case and the former Ordinance, we find that FAF is entitled to the permit. Pursuant to Section 7.3 of the former Ordinance, a developer seeking a permit was first required to submit an application. Upon receipt of the application, the Planning and Zoning Staff was required to complete the LESA evaluation. If the proposed development received a passing LESA score, a compatibility assessment meeting was scheduled. The purpose of the meeting was set forth in Section 7.6(a) of the former Ordinance as follows:

> The Compatibility Assessment Meeting allows the adjacent and confronting property owners and all other interested parties the opportunity to hear the developer's presentation and proposal. In his

> presentation he will address the compatibility of his project to the existing areas adjacent to the site. . . .Any discussion shall be limited to the proposal's compatibility as presented rather than whether the site should be developed by any other use.

Thereafter, Section 7.6(d) of the former Ordinance directed the Planning and Zoning Staff to prepare a "report of the developer's proposal, the agreed upon conditions, and other pertinent data" and then schedule a public hearing. According to Section 7.6(e) of the former Ordinance, the purpose of the public hearing was to "hear the staff's report of the issues and concerns raised at the Compatibility Meeting." Following the public hearing, Section 7.6(g) of the former Ordinance stated that the permit shall be issued, issued with conditions, or denied.

Having carefully reviewed the former Ordinance, we agree with FAF that other than the LESA scoring requirements, there was no specific substantive criterion governing the decision to deny or issue the permit. As discussed above, FAF received a successful LESA score, and the compatibility assessment meeting was conducted. At the meeting, various members of the public appeared and made 106 demands of FAF. FAF agreed to thirty-nine requests but refused to comply with the other demands some of which were clearly unreasonable. For example, one request was that FAF be required to compensate the community in the amount of $400,000.00 per year for the ecological loss of trees. Another request was that FAF be required to post a $500,000.00 bond to provide water

services for well failures on properties within a one-mile radius of the FAF property.

A public hearing was held on July 26, 2005, to deal with the unresolved issues from the compatibility assessment meeting. FAF submitted substantial evidence to support its subdivision development at that time. In particular, FAF presented expert reports to show that FAF traffic would not create a significant amount of peak traffic impact on any of the four studied intersections and further, that the level of service for the intersections involved fully complied with the terms of the Subdivision Ordinance. FAF also presented evidence that it was unlikely that its water system would interfere with the local wells and demonstrated that there were no sinkholes on its property. FAF further showed that the property is not historically significant;[10] that there are no previous recorded sites of archaeological significance on the property; and that the Phase 1 environmental report revealed nothing that could not be dealt with as the project progressed.

In contrast, the record shows that no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict FAF's traffic study. Anecdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony. Also, with respect to the other unresolved issues which primarily concerned the construction and design of the development and the history of the property, the record shows that no

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[10] See note 4, *supra*.

evidence was presented refuting or contradicting that presented by FAF. In sum, FAF addressed all the unresolved issues at the public hearing and its evidence was unrefuted. Accordingly, based upon all the above, we find that FAF complied with every requirement of the former Ordinance and therefore, is entitled to the permit.

In reaching our decision in this case, we were certainly mindful that many members of the public are concerned about the dangers of over development and the strain placed on local resources by an expanding population. However, zoning ordinances must be interpreted to balance the rights of individual property owners with the needs of the community. Such ordinances can only be effective if they are applied in an even-handed manner with the upmost adherence to the procedural rights of all parties. In this case, the BZA simply did not have the authority to reject FAF's application for a permit under the amended Ordinance because it was not in effect at the time the permit was requested. Furthermore, the evidence in the record shows that FAF satisfied all of the requirements necessary to obtain the permit. Consequently, we must reverse the decision of the circuit court which affirmed the BZA's decision and direct the Jefferson County Planning and Zoning Commission to issue the permit to FAF.[11]

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[11] Having found that the former Ordinance applied to FAF's request for a permit, we need not address the other issues presented by FAF in this appeal as they are moot because they concerned the BZA's application of the amended Ordinance. We also note that on February 29, 2008, FAF filed a motion to supplement the record with orders entered by the Circuit Court of Jefferson County on February 21, 2007, and February 26,

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Jefferson County entered on September 18, 2006, is reversed. This matter is referred back to the Jefferson County Planning and Zoning Commission with directions to immediately issue the conditional use permit requested by FAF.

Reversed.

2008, in a separate civil action wherein it appears that the circuit court invalidated the April 8, 2005 amendments to the Ordinance. This Court has taken judicial notice of those orders but they were not relevant to our decision in this case and were not considered.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

FAR AWAY FARM, LLC,

Petitioner,

v. CIVIL ACTION NO. 05-C-332
(Consolidated with O5-C-83)
Honorable Thomas W. Steptoe, Jr.

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
A public body, THOMAS
TRUMBLE, Member, JEFF
BRESEE, Member, and TIFFANY
HINE, Chair

Respondents.

ORDER AFFIRMING
BOARD OF ZONING APPEALS DECISIONS

The Court considered this matter on September 18, 2006, upon Petitions for Appeal from the September 22, 2004 decision of the Zoning Administrator assessing a Land Evaluation and Site Assessment (LESA) score of 46.2, and the September 15, 2005 decision of Board of Zoning Appeals (BZA) denying Far Away Farm's Conditional Use Permit (CUP). Richard G. Gay, Esq. and the Law Office of Richard G. Gay, L.C. represents Far Away Farm, Petitioner in Civil Action 05-C-332. Stephanie F. Grove, Esq., Office of the Prosecuting Attorney,

represents Respondents BZA, et al. Linda M. Gutsell, Esq. represents Edward E. Dunleavy and Edward R. Moore, who were Petitioners in Civil Action 05-C-83. The Court reviewed the Petitions, all exhibits, and other supporting material submitted therewith. The Court reviewed the findings of fact under the plainly wrong standard, and the application of law under the erroneous principle of law standard while presuming the BZA acted correctly. Syl. pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). The Court AFFIRMS both BZA decisions for the reasons set forth below.

Factual and Procedural Background

On June 23, 2004, Far Away Farms (FAF) applied for a Conditional Use Permit in order to develop approximately 122.88 acres in a designated Rural District in Jefferson County. The application listed the name of the applicant as FAF and the property owner as Alice and Dwayne Masemer. FAF proposed subdividing the land into 152 new home lots, one ten-acre lot with the existing farmhouse, and six acres to provide a trail. The size of each lot would be approximately one-third to one-fifth of an acre.

The Zoning Administrator conducted a Land Evaluation and Site Assessment (LESA). He assigned 12.2 points for the Total Land Evaluation of the site and 34 points for the Total Site Assessment, for a total LESA score of 46.2 points. He scheduled a Compatibility Assessment Meeting for November 3, 2004, sent out notices to adjoining landowners based on the list provided by FAF by domestic certified

mail, and placed two notices in the Spirit of Jefferson on October 14 and 21, 2004. Michael and Christine Delia, who are listed as adjoining landowners did not receive their notice because the Zoning Administrator's support staff did not send it international certified mail. The staff did not send notice to Edward E. Dunleavy, as Manager of Trough Bend Owners Association (TBOA), because he was not included on the list of adjoining landowners.

On October 29, 2004, Petitioners Edward E. Dunleavy and Edward R. Moore appealed certain aspects of the LESA score and the lack of notice to Mr. Dunleavy and the Delias to the Board of Zoning Appeals (BZA). Because of this appeal the November 3, 2004 Compatibility Assessment Meeting was cancelled and the BZA scheduled the appeal to be heard on January 20, 2005.

The BZA heard the appeal on January 20, 2005 and entered its decision on February 17, 2005. It reviewed the Zoning Administrator's decision *de novo*. After granting FAF's Motion to Intervene and denying Mr. Dunleavy and Mr. Moore's preliminary motions, the BZA entertained arguments on the merits of the appeal. The BZA extended the time limits for presentations and witnesses. FAF and Mr. Dunleavy and Mr. Moore each made presentations and questioned many witnesses under oath.

First the BZA found that notice to adjoining property owners was proper according to the Jefferson County Zoning and Land Development Ordinance (Ordinance) because the Zoning Staff provided adequate notice and the notice of the

Compatibility Assessment Meeting cured any technical defects in the notice. Second, it denied Mr. Dunleavy and Mr. Moore's Motion to Substitute Citizens United to Save Faraway Farms, LLC (CUSFF) for themselves as Petitioner because Mr. Dunleavy and Mr. Moore are the Appellants and they may call any witness, including any members of CUSFF, and CUSFF was not able to present a definitive list of its members. Third, it denied most of the LESA score appeals but changed the "Distance to the Growth Corridor" score from one to four and the "Comprehensive Capability: Highway score" from two to four, which added five points, changing the final LESA score from 46.2 to 51.2.[1] It denied the appeals of the "Adjacent Development," "Comprehensive Capability- Park/Historical," "Central Water," and "Central Sewer" scores.

The BZA used the Plat marked "Board Exhibit No. 1" to evaluate the measurements of adjacent development. It found that parcels 7.6 and 7.25 were part of the original Gano Subdivision, which was subdivided again to create Cavaland Subdivision. Therefore, the boundary of those parcels was subject to intense development pressure. Thus, the BZA found that a score of two was accurate because 5,885 feet (57.5%) of the boundary is subject to intense pressure and 4,348 feet (42.5%)

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[1] All parties have represented that the total LESA score changed from 46.2 to 50.2. This is incorrect. Although the BZA stated in its decision on the appeal that the "Distance to the Growth Corridor" score changed from two points to four points, the Zoning Administrator assessed it a score of one. Therefore, that score changed from one point to four points, making the total LESA score 51.2, not 50.2.

of the boundary is lacking development pressure. The BZA changed the LESA score pertaining to the Distance to Growth Corridor from one to four points by measuring the distance "as the crow flies." However, the BZA concluded that one point was a correct assessment for Comprehensive Capability: Park/Historical because FAF is not designated in the Comprehensive Plan as a historical site. In addition, it is not on the National Historical Register. Mr. Dunleavey and Mr. Moore filed a Petition for a Writ of Certiorari on March 17, 2005.

On November 30, 2004, FAF filed a Motion to Intervene, which eventually the BZA granted at the January 20, 2005 hearing on the LESA score appeal. During this time the BZA adopted rules of procedure on January 4, 2005. Mr. Dunleavy and Mr. Moore submitted their documentary evidence to the Board and copies to FAF according to these new rules before they went into effect. FAF submitted documentary evidence to the BZA along with notice to Mr. Dunleavy and Mr. Moore that the submissions were available for viewing at the BZA. FAF submitted the evidence before the new rules went into effect and before the BZA granted its Motion to Intervene.

On March 21, 2005, because the BZA made its final decision on the LESA score appeal, the Zoning Administrator published notice that the Compatibility Assessment Meeting would go forward on April 13, 2005. FAF provided the Zoning Administrator's support staff with an updated list of adjacent property owners, which included Trough Bend Owners Association. In addition, the staff mailed the Delias' notice by international certified

mail and they received it. The seven-hour Compatibility Assessment Meeting took place on April 13, 2005.

A Compatibility Assessment Meeting includes only the Zoning Administrator, the developer and its agents, and any interested public citizen or citizen group, but not the BZA. The developer's agent presented its proposal and some citizen groups and many public citizens expressed their concerns and requests. Of the 106 issues that the public raised, the developer agreed to modify its plan or actions and resolved 39 of the issues. According to Ordinance § 7.6(d), the Zoning Administrator prepared a report listing the 39 resolved issues and the 67 unresolved issues and scheduled a public hearing of the BZA on July 26, 2005.

The July 26, 2005 meeting was the first time the BZA decided a Conditional Use Permit (CUP) issue.[2] The Zoning Administrator argued to the BZA that its new Procedural Rules did not provide time guidelines for considering a CUP, but that the BZA could use the guidelines in Ordinance § 7.7(b) as long as it established them at the beginning. The BZA voted in favor of providing the following time limits for presentations: 30 minutes for FAF, 30 minutes for CUSFF, 15 minutes for individuals, 5 minutes for groups, and 15 minutes for FAF's rebuttal The BZA did not take any testimony; therefore, no cross-examination took place. However, the BZA allowed FAF to submit unlimited memoranda and documents in support of its CUP

[2] In the past, the Ordinance provided that the Planning Commission would decide on CUPs. However, the April 8, 2005 amendment gave that decision-making power to the BZA.

application. FAF submitted a 30-page memorandum addressing each of the 67 unresolved issues and expert witness reports totaling 320 pages.

- FAF presented to the BZA that its development was compatible with the character of the land, nature of the land, and its relationship to the community as a whole because it consists of single-family homes, there is a 50-foot buffer around the whole property, the development will not create a significant amount of peak traffic impact, and it will include the old farm house and a park. Members of the public spoke about their experience with the neighborhood roads, the rural and agricultural nature of the surrounding properties, and the historical significance of the FAF property. In particular, adjoining property owners expressed concerns that the roads were too narrow for a school bus to travel on and increased traffic in general. They reiterated that the evidence presented at the LESA score appeal demonstrated that FAF was a historically significant area. One of the biggest issues that the adjoining property owners spoke to was density and the agricultural nature of the area.

The BZA concluded the meeting and set a special meeting on August 9, 2005 to take action on FAF's CUP application. At that meeting, the BZA's attorney advised them to look at the overall compatibility and at the unresolved issues. In addition, the attorney suggested that the BZA could resolve some of the unresolved issues in order to make it compatible, but he stated there was no guidance on this so it was in the BZA's discretion. The BZA denied the CUP based on two pieces of evidence, an aerial photo labeled "Unresolved Issues-

Neighborhood Compatibility" dated July 15, 2005, and an item date-stamped July 7, 2005 labeled "Exhibit 1 Characteristics of the Neighborhood within One Mile Radius of the Southeast Corner of Faraway Farms." This item included a list of the 176 lots in that area showing an average acreage size of 14.56.

The BZA found that the aerial photograph demonstrated that the density of the proposed development is far in excess of anything around it, and that the actual lot size will be 1/5th to 1/3rd of an acre. It concluded that the development is incompatible with the surrounding neighborhood. Exhibit I reinforced the incompatibility by demonstrating that the average lot size of the surrounding neighborhood is 14.56, and that 28 of its 176 lots are over 20 acres. Furthermore, the BZA heard much testimony on the density problems with the FAF development: there were approximately 10 unresolved density issues, and the number of homes was not compatible with the roads that would serve the development. There were approximately 17 unresolved issues related to the adequate physical condition of the roads. The BZA found that a development with much lower density could render these issues moot. In the end, the BZA could not resolve issues regarding density and the physical condition of the roads in order to provide the developer with a permit that resembled what it proposed; therefore, it denied the CUP.

Standard of Review

"While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court

should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syl. pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, S.E.2d 93 (2003). The plainly wrong standard presumes an administrative tribunal's actions are valid as long as the factual findings are supported by substantial evidence. *Maplewood Estates Homeowners Ass 'n v. Putnam County Planning Corn 'n*, 2006 WL 842878,629 S.E.2d 778, 782 (W. Va. 2006). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*

Law and Reasoning

I. Preliminary Procedural Matters

A. FAF's Motions to Exceed Page Limits and Supplement Record

FAF requests the Court to allow it to submit a 28-page memorandum in opposition to Mr. Dunleavy and Mr. Moore's Writ of Certiorari and supplement the record by adding the following: a December 16, 2004 letter to Ms. Linda Gutsell, a list of properties on the National Register Sites and Districts in Jefferson County, a January 19, 2005 letter to Senator Byrd from the National Park Service, and a West Virginia Department of Transportation Intent-To-Apply form from Mr. Dunleavy.

The Court **ORDERS** FAF's Motion to Exceed Page Limits **GRANTED** because the issues before

the Court are complex and warrant additional discussion. *The Court* ***ORDERS*** *FAF's Motion to* Supplement the Record **GRANTED** because the above documents may assist the Court and Mr. Dunleavy and Mr. Moore did not object.

B. Mootness

FAF argues[3] that because the BZA has already denied its CUP application, Mr. Dunleavy and Mr. Moore's appeal of the BZA's decision on the LESA score is moot. Mr. Dunleavy and Mr. Moore argue that their appeal is not moot because FAF is also appealing the BZA's denial of its CUP and if this Court or the West Virginia Supreme Court of Appeals reversed the BZA's denial then a non-passing LESA score could be dispositive of the CUP application.

The Court agrees with Mr. Dunleavy and Mr. Moore. The Jefferson County Zoning and Development Review Ordinance (Ordinance) § 6.2 allowed a LESA score of 55 or less to advance a CUP application to the Compatibility Assessment stage. Ordinance § 6.2 (Amended August 8, 2002). However, the BZA could have evaluated a score of more than 55 for advancement. If Dunleavy and Moore were to convince this Court that the BZA erroneously found the LESA score to be 55 or under, that finding could defeat a successful appeal by FAF of the BZA's denial of its CUP. Therefore, the Court

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[3] Whenever the Court states "FAF argues" or "Dunleavy and Moore argue," the Court also includes the BZA's arguments because the BZA argued with FAF on the LESA score appeal and with Dunleavy and Moore on the CUP appeal.

FINDS that Mr. Dunleavy and Mr. Moore's appeal of the BZA's decision on the LESA score is not moot.

C. Interlocutory

FAF argues that a LESA score is not a final decision that a party can appeal by a writ of certiorari because the final decision did not occur until the BZA denied its CUP. Mr. Dunleavy and Mr. Moore argue that their appeal is not interlocutory because it is unclear whether they could have delayed filing their appeal until the BZA decided on the FAF's CUP.

"*Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.*" W. Va. Code § 8A-9-1 (2003), emphasis added. This Court noted, "Statutorily-provided certiorari is only available to review final decisions of a planning commission," which means, "interlocutory' decisions of a planning commission are not subject to review on certiorari." *BC Partners Inc. v. Jefferson Planning and Zoning Commission*, 03-C-323 (W. Va. Cir. Ct. October 27, 2004); citing *Lower Donnally Ass'n v. Charleston Mun. Planning Com'n*, 212 W.Va. 623, 575 S.E.2d (2002). In discerning that a decision by the Planning Commission (Commission) to reject a Community Impact Statement (CIS) was not a final decision, this Court explained that "the Commission's decision to reject a CIS has no bearing whatsoever on the ability of the developers to proceed through the plat approval process, or even to gain final plat approval." *BC Partners Inc.*, 03-C-323 at p. 4.

The West Virginia Supreme Court of Appeals decided *Lower Donnally* before the Legislature repealed W. Va. Code § 8-24-38. Although the Legislature did not specifically replace this section, it dealt with the issue for writ of certiorari for a planning commission as well as a board of zoning appeals in W. Va. Code § 8A-9-1. Where 8A-9-1 refers to every decision of a commission and board, 8-24-38 refers to a decision of a commission. Therefore, the Court **FINDS** that the BZA's decision concerning the LESA appeal is not interlocutory because the statutorily-provided certiorari specifically states it is available to every decision by the BZA. Even if *Lower Donnally* somehow applied to 8A-9-1, the BZA' s decision is not interlocutory under *BC Partners Inc.* because a passing LESA score has direct bearing on the ability of the developers to go forward.

D. Motion to Continue and Notice and Service

Mr. Dunleavy and Mr. Moore argue that the BZA should have granted their Motion to Continue because Mr. Dunleavy and other adjacent landowners did not receive proper notice. Mr. Dunleavey did not receive notice as the president of Trough Bend Homeowners Association, Trough Bend being the official owner of an adjacent storm water management parcel. Mr. and Mrs. Delia did not receive notice in England, and the other adjacent landowners did not receive notice until 22 days after the Zoning Administrator decided the LESA score. They argue that service was defective because FAF and the Zoning Administrator did not serve their evidentiary submissions on them or any other

adjoining landowners. And because of this defective notice, they did not have enough time to secure counsel and file an effective appeal. Furthermore, they point out that the BZA did not rule on their Motion to Strike for lack of proper service.

FAF argues that notice was proper because it gave a list of the names and addresses of all adjacent landowners to the BZA as required by the Ordinance. In addition, it was not required to provide the information for Trough Bend because it is only a storm water management parcel, which will not be harmed by a new subdivision. Because the purpose behind notice is to allow landowners to voice their opinion about potential harm to their land, FAF argues that it was unnecessary to provide Trough Bend's information to the BZA. Moreover, Trough Bend Homeowners Association does not appear on the tax maps. Additionally, FAF maintains that service was proper because FAF was not required to serve its evidentiary submissions according to the BZA's Procedural Rules. This, it contends, is because it did not have intervenor status at the time it served and the new procedural rules were not in effect at the time it served. Furthermore, the Zoning Administrator's decisions did not have discretion, therefore he did not need to be at the appeal and his written submission was considered along with all the other evidence without any deference.

1. Service

The West Virginia Rules of Civil Procedure only apply to an administrative proceeding in which the administrative body's rules of procedure provide

for them to apply or reference them. *State v. West Virginia Judicial Review Board*, 164 W. Va. 363, 365, 264 S.E.2d 168, 170 (1980); *State ex rel. v. Smith*, 198 W. Va. 507, 513, 482 S.E.2d 124, 130 (1997). The BZA's procedural rules that were in effect for the January 20,2005 meeting allowed the BZA to "continue, reschedule or re-open proceedings for any good cause deemed reasonable and appropriate." Jefferson County BZA Rules of Procedure, § 6(c). Prior to January 4, 2005, no procedural rules for submissions existed. Procedural Rule § 4 provides the time frames and format for service of documents to the BZA and others. Neither this section nor any other provides rules for service upon non-parties or Zoning Administrators. Although West Virginia has not dealt with submissions to a BZA by a Zoning Administrator in its case law, other states in the Fourth Circuit have. Virginia courts have allowed a Zoning Administrator to submit memos to the BZA in circumstances such as to detail staff opposition to an application, to recommend against approval, and to ask it to instigate action to revoke special use permits. *Amoco Oil Co. v. Board of Zoning Appeals for the City of Fairfax*, 30 Va. Cir. 159, WL 945947 (Va. Cir. Ct. 1993); *Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., et al.*, 217 Va. 740, 232 S.E.2d 767 (1977). West Virginia recognizes that in Jefferson County, the Planning Commission hires the Zoning Administrator and the Planning Commission or the Ordinance defines his or her job duties. *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873, 380 (2005).

Because FAF submitted its evidence to the BZA before the procedural rules went into effect, it was not under any obligation to follow the rules for service in the procedural rules. But FAF still provided to Dunleavy and Moore notice it had submitted its evidence to the BZA. Even had the rules of procedure been in effect when submissions were made, the rules do not obligate or direct non-parties as to service. Therefore, because the Civil Rules of Procedure would not automatically apply to BZA proceedings, the BZA did not erroneously find that service was proper as to FAF.

Furthermore, the BZA did not erroneously fmd that service was proper as to the Zoning Administrator's memo because he simply was acting as a county employee when he submitted a memo outlining the process that led him to his LESA score. Consistent with the BZA's de novo review of his determination, there is no evidence in the record that the BZA gave any deference to his memo. Thus, the Court **FINDS** that the BZA did not erroneously find service was proper. Lastly, the Court **FINDS** that Mr. Dunleavy and Mr. Moore's counsel's statement, "if they weren't served they should be stricken for not given our continuance," is not a Motion to Strike that the BZA needed to rule upon. Transcript, January 20, 2005, p. 57.

2. Notice

When a developer files an application for a CUP, it must "submit a list of all property owners, and their addresses, adjacent to and confronting the property which is to be developed." Ordinance § 7.4(e) (as adopted on July 7, 1988). Once the BZA

staff has reviewed the application and collected fees, the "staff will notify the adjacent and confronting property owners of the date, time and place of the Compatibility Assessment Meeting by registered mail. . ." Ordinance § 7.5(b) (as amended on May 4, 1989). However, a Compatibility Assessment Meeting cannot take place unless the Zoning Administrator has determined that the application has a passing LESA score through the Development Review System (DRS). The purpose of the DRS "is to assess a particular sites (sic) development potential . . ." Ordinance § 6.1 (as adopted on July 7, 1988). It is a numerical rating system that produces a LESA score. *Id.* An application will advance to a Compatibility Assessment Meeting if the Zoning Administrator has assessed it a LESA score of 55[4] or less. Ordinance § 6.2 (as amended on August 8, 2002).

In addition, the "Zoning Administrator shall determine if the sketch plan and support data are adequate. Once the Zoning Administrator places the advertisement in the paper, any interested party has thirty days to appeal the inadequacies of the sketch plan and/or support data to the Zoning Board of Appeals." Ordinance § 7.4(g) (as amended May 18, 1996). The Ordinance does not provide a similar section directing the Zoning Administrator as to the LESA score. However, Section 8.1(a) and (b) provide that an aggrieved person may appeal any administrative decision based or claimed to be based

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[4] The Ordinance in effect at the time that the Zoning Administrator calculated the LESA score did not explicitly state that he was to determine the LESA score, only that the staff would evaluate it. The April 8, 2005 amendment specifically added this duty to reflect reality.

upon the Ordinance within 30 days of the decision appealed. Ordinance § 8.1 (a) and (b) (as adopted July 7, 1988).

The Court recognizes that it may be difficult for one to discern when the limitation period starts and ends for a LESA score appeal. However, it was not erroneous for the BZA to find that the BZA staff's notice was adequate and notice of the Compatibility Assessment Meeting according to Section 7.6 would cure any technical defect in notice. Because when the staff provided notice of the Compatibility Assessment Meeting that actually took place on April 13, 2005, TBHA was on the list of adjacent property owners, and both TBHA and the Delias received that notice. Moreover, the purpose of the notice according to Section 7.5(b) is to alert adjacent and confronting property owners of the "date, time, and place of the Compatibility Assessment Meeting," not that the Zoning Administrator decided a LESA score. Ordinance § 7.5(b). Therefore, the Court **FINDS** it was not erroneous for the BZA to find that notice was adequate. Thus, the Court **FINDS** that it was not erroneous for the BZA to deny Mr. Dunleavy and Mr. Moore's Motion to Continue.

E. Motion to Substitute CUSFF As Party Appellant

Mr. Dunleavy and Mr. Moore argue that the BZA erroneously denied their Motion to Substitute because it focused on the fact that Dunleavy and Moore were the only parties that were also members of CUSFF and that if it allowed the motion it would be tantamount to allowing a late appeal. Dunleavy

and Moore argue, however, that a limitations argument is not available to FAF because it is not a jurisdictional issue; rather it is a mere substitution. They maintain that the BZA has discretion to substitute as long as there is no prejudice and that there is not prejudice here because a group can have standing if one member has standing. Also, they argue the BZA cannot substitute FAF and not CUSFF.

FAF argues that this is not a mere replacement because CUSFF could contain countless members. FAF contends that CUSFF will not suffer any harm because Mr. Dunleavy and Mr. Moore can call unlimited witnesses from the CUSFF membership. Moreover, they argue that the BZA did not erroneously deny Dunleavy and Moore's motion because the Ordinance does not allow the BZA to substitute parties in an appeal process; it only allows verified appeals filed within 30 days of an administrative decision. CUSFF was not formed within 30 days of the Zoning Administrator's LESA score decision.

Dunleavy and Moore cite to some secondary sources and a Nebraska case for the proposition that a tribunal has discretion to substitute parties, that it cannot arbitrarily refuse to substitute it if there is no prejudice, and that limitations arguments are not effective against substitution. 59 Am. Jur.2d Parties § 328; Change in Party After Statute of Limitations Has Run, 8 A.L.R.2d 6, at §35; *New Light Co., Inc. v. Wells Fargo Alarm Services*, 252 Neb. 958, 567 N.W.2d 777 (1997). After a review of above authorities, the Court finds that their conclusions are based on individual states' rules of civil

procedure or, in the Nebraska case, a specific state statute.

However, as stated above, West Virginia case law only allows the application of the West Virginia Rules of Civil Procedure to an administrative proceeding when the administrative body's rules of procedure provide for it. *West Virginia Judicial Review Bd.*, 164 W. Va. at 365. The BZA Rules of Procedure do not provide that the Rules of Civil Procedure apply to its proceedings. Additionally, the BZA's Rules of Procedure do not mention a procedure for substitution much less any standard for not arbitrarily refusing it without a showing of prejudice. Actually, there is a good argument that the BZA has complete discretion over substitution because neither the Ordinance nor the BZA's Rules of Procedure mention it.

The Court finds Dunleavy and Moore's citations unavailing because they only address situations in which a state's Rules of Civil Procedure or a specific statute applies to an administrative body. Here, the BZA Rules of Procedure do not allow for the application of the Rules of Civil Procedure and the BZA Rules themselves do not explicitly provide for substitution. The BZA did not act erroneously by denying Dunleavy and Moore's Motion to Substitute because it is in the BZA's discretion to grant or refuse substitution and the BZA Rules do not provide for any standard regarding when or if substitution is appropriate. The Ordinance clearly requires that appellants must verify an appeal of an administrative decision before 30 days expires; CUSFF was not formed before that time. Insofar as Dunleavy and Moore challenge

FAF's "substitution," the record shows that the BZA did not substitute FAF for the owners of the property; it found them as a successor-in-interest because FAF purchased the property from the Masemers. Also, FAF appears as the applicant on the CUP application. Thus, the Court **FINDS** the BZA did not erroneously deny their Motion to Substitute.

F. Due Process and Mr. Doug Rockwell

In their Petition for Writ of Certiorari, Dunleavy and Moore argue that Mr. Rockwell, a BZA member, should have disclosed that he was a lawyer in the firm of Crawford and Keller, PLLC because that firm assisted in creating FAF, LLC. They contend that because he did not disclose this fact, they suffered a denial of due process because they did not have chance to move for his recusal, FAF argues that due process only would be triggered if a property interest exists and that Dunleavy and Moore they do not have a property interest in FAF's LESA score or CUP application.

After examining the record, the Court did not find any facts that support the conclusion that Mr. Rockwell was an interested party. The law provides no duty to disclose unless an individual is an interested party. Therefore, the Court FINDS that Mr. Rockwell was not an interested party; thus, the BZA did not deny Mr. Dunleavy and Mr. Moore due process by failing to disclose his employment in the firm that assisted in FAF's creation.

G. Due Process and the July 26, 2005 BZA Meeting

FAF argues that the BZA did not provide it with due process because the July 26, 2005 hearing did not include testimony, it did not have an opportunity to conduct cross-examination, and it did not have sufficient time to present its expert witnesses.

Even if a vested property right of FAF existed in the CUP such that Due Process rights existed, which is contested, Dunleavy and Moore argue the BZA did give FAF due process because it adhered to procedural time frames, and because it allowed FAF to submit unlimited written evidence, which FAF did. Moreover, they argue, Due Process was not denied because at the April 13, 2005 Compatibility Assessment Meeting, the BZA took testimony of FAF's witnesses, and FAF had an opportunity to cross examine the opponents and their witnesses.

Jefferson County Rules of Procedure (Rules) provide every party of record "the rights of due process, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing." Jefferson County R. Pro. 6(j) (as amended June 1, 2005). "Any claim of entitlement to a constitutionally protected interest is determined by state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). The West Virginia Supreme Court of Appeals has recognized that due process extends to administrative tribunals. *State ex rel Hoover* at Syl. pt. 1. Administrative agencies must follow their own rules so as not to violate the due process clause *Tasker v Mohn*, 165 W Va 55, 56, 267 S E 2d 183,

189 (1980) Therefore, due process applies to BZA meetings because Rule 6(j) provides for it.

"When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action." *State ex rel. Hoover* at Syl. pt. 2. The United States Supreme Court has outlined the factors that must be considered when determining the procedural protections that due process affords. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The factors are: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value, if any, of additional or substitute procedural safeguards, and (4) the government's interest, including the functional, fiscal, and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The Rules provide that "[e]ach party of record shall have thirty (30) minutes for presentation and where appropriate each party has 15 minutes for rebuttal." Jefferson County R. Pro. 6(1) (as amended on June 1, 2005). However, the Chair may grant extensions of these time limits. *Id.* In addition, "[a]ny relevant evidence shall be admitted if it is the type which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The Board shall retain discretion to admit or exclude any evidence." *Id.* at

6(g)(2). The BZA may limit the number, nature, and length of testimony if it finds the "testimony will be repetitious, cumulative or irrelevant." *Id.* at 6(j). Although cross-examination is permitted, the BZA has discretion to limit it. *Id.*

In cases like the one before the Court, the BZA conducts the DRS in order to determine if it can issue a CUP to developers who wish to create subdivisions of higher densities than the Rural District allows. FAF's due process interest in the CUP process is that the BZA follows its procedural rules in issuing or denying a CUP. At the July 26, 2005 meeting, the BZA provided FAF with 30 minutes to present and 15 minutes for rebuttal. This allotment did not include, and was increased by, questions that BZA members asked FAF and when FAF answered thereto. The BZA did not deny FAF the opportunity to present testimony through witnesses, FAF chose not to present witnesses, complaining the BZA time frame were insufficient within which to present its witnesses. Additionally, after review of the transcript, the Court found that no individual gave testimony; therefore, the issue of cross-examination is moot.

The procedural protections that the BZA provided to FAF comport with due process. Here, FAF's private interest is a CUP so it can have a higher density subdivision than the Rural District automatically allows. However, the risk of deprivation of this interest is low because the DRS provide numerous hearings, some of which include testimony and cross-examination, and the opportunity to submit an unlimited amount of written evidence. The probable value of expanding

the BZA's time frame and guaranteeing testimony and cross-examination would be that a party would present the fullest case possible. But, this probably would create a multi-day or weeklong hearing and bog down the DRS process, and it would cost more. Therefore, the Court FINDS that the BZA provided FAF with due process.

II. LESA Score Appeal[5]

"While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction" Syl pt 1, *Corliss v Jefferson County Bd of Zoning Appeals*, 214 W Va 535, 591 S.E.2d 93 (2003). "While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable." Syl. pt. 4, *Corliss*, 214 W. Va.

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[5] The Court notes that only if Mr. Dunleavy and Mr. Moore were successful in convincing the Court that the BZA erroneously found the three LESA scores appealed, would the LESA score be significantly above 55. If one starts with the BZA score of 51.2, it would go up only two points for adjacent development pressure to 53.2, two points for distance to growth corridor to 55.2, and only one point for Park/Historical, culminating in a score of 56.2.

A. Calculation of Adjacent Development Pressure

Dunleavy and Moore argue that the BZA erroneously interpreted the Ordinance when it classified parcel 7.25 and 7.6 as part of the "intense development boundary." They argue that Ordinance § 6.4(b) required the BZA to first categorize each parcel as "agricultural" or "not indicating intense development pressure" and that no parcel can be included in both categories. They argue that a tax map is inadequate to determine whether land is agricultural or not, and that the BZA incorrectly used the tax map to evaluate this part of the LESA score, rather than using the unrebutted evidence that both parcels were in agricultural use. Lastly, they argue that it was plainly wrong for the BZA to find that parcel 7.6 and 7.25 were part of the Gano subdivision and later the Cavaland subdivision.

FAF argues the BZA did not erroneously interpret the Ordinance because it is reasonable for it to conclude that "intense development pressures" has started when any division of five lots happens, and size does not matter. Furthermore, they argue that the BZA had substantial evidence to find that parcels 7.6 and 7.25 were part of the "intense development boundary" because the plats in evidence show they were part of five-plus parcel subdivisions.

Ordinance § 6.4(b) provides for the calculation of "adjacent development pressure."

> This criterion assesses a combination of the percentage of land in actual

> agricultural use (including timber or pasture land) and percentage of adjacent land that does not indicate that there is development pressure. Intense development pressure includes more than a 5 lot (sic) subdivision and commercial or industrial uses. An average of the two will yield. a percentage of land adjacent to the property that is either farmed or not intensely developed.

Ordinance § 6.4(b) (as adopted in July 7, 1988).

The intent is that a Rural District "is to provide a location for low density single family residential development in conjunction with providing continued farming activities." Ordinance § 5.7 (as amended on May 18, 1996). The purpose of the Rural District designation is to "preserve the rural character of the County and the agricultural community." *Id.* Even so, this section allows for higher density development if an applicant uses the DRS. *Id.*

The record shows that parcels 7.6 and 7.25 were originally part of the Gano land.[6] In 1977 Mr. W. E. Gano, Jr. subdivided a parcel of his land into tracts A through E with a reserve tract. In 1986, he further divided tract A into a residue parcel of 13.25 acres and a 10.00-acre exemption parcel, which are

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[6] The Court looked to a plat of the Gano property dated 1977 and date stamped December 2, 2004, and attachment 5 and 6 from Mr. Dunleavy and Mr. Moore's appeal packet to the BZA.

parcels 7.6 and 7.25 respectively. Even though the BZA may have incorrectly labeled tract A as part of the Cavaland subdivision, there is substantial evidence for the BZA to find that parcels 7.6 and 7.25 were part of a 5-lot-plus subdivision because Gano divided the original parcel into 6 lots in 1977. Therefore, the Court FINDS that the BZA was not clearly wrong in finding that parcels 7.6 and 7.25 were part of the Gano 5-lot-plus subdivision.

The Court agrees with Mr. Dunleavy and Mr. Moore's interpretation of Section 6.4(b) requiring a classification of agriculture or low intensity development pressure versus high intensity development pressure. However, the record shows that the BZA interpreted that section similarly to Dunleavy and Moore by taking testimony regarding agricultural use of land, but eventually finding that land as high intensity use. That is, the BZA focused on classifying the parcels as high intensity, which is a 5-lot subdivision or more, rather than accepting that the parcels were agricultural. But it did not disregard the possibility that the parcels were agricultural because Mr. Gregory L. Mason, who owns parcel 7.6, testified as to his and Mr. Dennis Jackson's, who owns parcel 7.25, possible agriculture use, and the BZA noted this in its discussion on this factor. Mr. Rockwell noted "that there was testimony that Lot 10 was presently used by the owner to board her (six) race horses along with other livestock." (January 20, 2005, Transcript, p. 270). However, the BZA apparently found there was not sufficient evidence to conclude that the land was agricultural, dispite the testimony that in some cases it was being used for agriculture. *Id.* Therefore, the Court **FINDS** that the BZA's

interpretation of the Ordinance was not unduly restrictive or in conflict with the legislative intent; thus, it did not erroneously apply the Ordinance.

B. Calculation of Distance to Growth Corridor

Mr. Dunleavy and Mr. Moore argue that the BZA's interpretation of the distance to a growth corridor being "as the crow flies," is at odds with other manners of measuring "proximity" criteria. They argue that the use of the identical term by the legislative body would indicate that the manner of measurement is meant to be the same in each instance, and, thus, that the measurement should have been taken from the nearest exit from the parcel and along the traveled road ending at the Residential Growth Corridor.

FAF argues the BZA was correct in using the measurement "as the crow flies" for the distance to growth corridor because a 500-home subdivision could abut the development, but it might take one a mile to drive there. That would not accurately measure how close the development is to the growth corridor. FAF argues that using driving distance for assessing proximity to schools is logical because the concern is how far school buses must drive from the development to school, but that the same rationale does not apply for the growth corridor.

Under the title of Distance to Growth Corridor, "[t]he distance to the growth corridor relates to the distance of the subject parcel to the boundaries of the Residential-Growth District adopted within this ordinance." Ordinance § 6.4(c).

Under the title of Proximity to Schools, "[t]he purpose of assessing the proximity of schools to new development is to avoid excessive busing of students." Ordinance § 6.4(e). For example, the Ordinance assesses zero points if the development is located less than two miles from schools.

Neither section of the ordinance indicates a method of measuring distance or proximity. The BZA has used driving distance for issues with bussing and "as the crow flies" with issues of distance to a residential-growth district. This interpretation is not unduly restrictive or in conflict with the intent of the Ordinance because the concern is with how far busses must travel versus how near the development is to an area that is denser and expanding. Section 6.4(c) addresses where the area is, not how one would travel there. Therefore, the Court **FINDS** it was not erroneous for the BZA to measure the distance "as the crow flies" even though it uses driving distance for measuring proximity to schools.

C. Comprehensive Compatibility: Park/Historical

Dunleavy and Moore argue that the property is historically significant and so it should be entitled to a higher LESA score. They argue that points were omitted for historicity first because FAF's experts did not consult with any official that determines historicity in creating their reports and secondly, because the BZA erroneously assumed that listing on the Comprehensive Plan or a historic registry was a prerequisite for such points being awarded. They point out that the BZA cannot require a site to be

designated in the Comprehensive Plan as a historic site because the Ordinance does not provide for that. Also, owners must consent before a property can be listed on the National Registry and it is not on that registry, but the site is listed on the American Battlefield Protection Program Registry as a Class C battlefield.

FAF responds by noting that if the BZA did not have a listing criterion of whether or not the property is a designated historical area, all of Jefferson County could be considered historically significant because it was a contested region during the Civil War. They argue that the BZA was correct in assessing its score because the land is not listed on the national or state register of historic places.

When the BZA evaluates the compatibility of the development to the Comprehensive Plan, it "shall determine whether the site development is supportive or has a negative impact on the following elements of the Comprehensive Plan: Highway Problems Areas (4 points), Compatibility of site development with designated parks, historical and recreational areas (2 points), and land use policies and recommendations (2 points)." Ordinance § 6.4(d) (as adopted on July 7, 1988). The points are assigned as follows:

	"POINTS
Site development has a negative Impact on element	2+
Site development is no supported or against element of the Plan	1+
Site development has a supportive Effect on element	0+"

Id.

The Ordinance does not define "designated historical areas." However, according to state statute, a historic site is defined as one that had a "significant event, a prehistoric or historic occupation or activity, or a building or structure whether standing, ruined or vanished, where the location itself possesses historical, cultural or archaeological value regardless of the value of any existing structure *and designated as historic on a national, state or local register*." W. Va. Code § 8A-1-2(n) (emphasis added). The Ordinance defines a historic site as "[a]ny lot, parcel, historic structure, or designated area which has been listed on the West Virginia or the National Register of Historic Places." Ordinance § 2.2 (as adopted on July 7, 1988).

After reviewing the list of battlefields on The American Battlefield Protection Program's website, the Court found Botelor's Ford (also known as Pack Horse Ford) listed as a Class C battlefield in the Battle of Shepherdstown with no mention of Far Away Farm. Neither the website nor the record offers definitive evidence that Far Away Farm is officially considered part of the Battle of Shepherdstown. Even though the Ordinance does not expressly state that the BZA must look to the Comprehensive Plan to determine if a site is a designated historical area, it is not erroneous for the BZA to conclude that it may look to the Comprehensive Plan as part of the Comprehensive Compatibility factor. Because the 2004 version of the Comprehensive Plan included a list of places listed on the National Historical Register, it was reasonable for the BZA to look to the list as

providing the designated historical areas under the Ordinance.

The West Virginia Code does provide a broader definition of "historic site" than the Ordinance because it allows designation as such on even a local registry. However, the BZA was determining what a "designated historic area" was, as used in Ordinance 6.4(d), and not the definition of "historic site" in general. It concluded that a "designated historic area" was one that was designated in the Comprehensive Plan as a "historic site", which is based on being listed on the West Virginia or National Historical Register according to Section 2.2. Therefore, the Court **FINDS** that it was not unduly restrictive or against the intent of the Ordinance for the BZA to conclude the site was not a designated historic area. Furthermore, the Court **FINDS** it was not erroneous for the BZA to uphold the Zoning Administrator's assessment of one point for this category because Far Away Farms is not listed on the state or national registries, although it may have some historical significance because of the Battle of Shepherdstown. Thus, it is neither supportive of nor against this criterion.

The preceding BZA applications of law and findings of fact were reasonable and supported by substantial evidence. Its interpretations and findings may not be the best ones, but the Court's function is not to substitute its opinion unless the BZA was clearly erroneous in its application of the law or clearly wrong in its findings of facts. Consequently, since the Court did not find any of the BZA's applications of law or findings of fact to be erroneous or clearly wrong, the Court **ORDERS** the

BZA's January 20, 2005 Decision **UPHELD**, and the appeal of Mr. Dunleavy and Mr. Moore is **ORDERED** dismissed.

III. Conditional Use Permit (CUP)

"While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syl. Pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, S.E.2d 93 (2003). The plainly wrong standard presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence. *Maplewood Estates Homeowners Ass 'n v. Putnam County Planning Corn 'n*, 2006 WL 842878, 629 S.E.2d 778, 782 (W. Va. 2006). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*

A. Factual Findings

FAF contends that because the Ordinance permits an increase of density in a Rural District, density is factually irrelevant. Therefore, it argues that the BZA wrongly determined that compatibility is equivalent to density because it should have evaluated type of use not amount of use. Moreover, it argues that the BZA used anecdotal traffic evidence from the public instead of empirical evidence from its traffic experts, which is not

substantial evidence to support a conclusion that the traffic impact would be significant (road was inadequate to service the subdivision as proposed).

Dunleavy and Moore argue density is relevant because a developer must seek a CUP in order to increase density from what a Rural District normally allows, and the BZA must decide if a CUP is compatible with the Rural District. In this case, they argue that the BZA had substantial evidence that the density of the surrounding neighborhoods was much lower than what FAF proposed. They also point out that traffic experts may study traffic patterns for only a short time, whereas residents have the opportunity to observe the patterns every day over a longer period of time. Likewise, the BZA does not have to ignore lay people's observations over a traffic expert's, and FAF did not present proof that the BZA ignored its expert evidence.

Ordinance § 5.7 provided that property owners may only subdivide one lot per every ten acres and the minimum lot size must be three acres. Ordinance § 5.7(d) (as amended on May 18,1996). However, it allows a higher density if an applicant uses the DRS and the BZA issues a CUP. Ordinance § 5.7. Still, the "purpose of this [rural] district is to provide a location for low density single family residential development in conjunction with providing continued farming activities." *Id.* This functions "to preserve the rural character of the County and the agricultural community." *Id.*

In *Kaufman v. The Planning and Zoning Comm. of the City of Fairmont*, that Court held that Commission members could not consider their past

experiences or their own observations in reaching a decision; they could only consider material presented to them for the record that bears on their decision. 171 W. Va. 174, 182, 298 S.E.2d 148, 155 (1982). In that case, Petitioners submitted a preliminary plat approval for a subdivision to the Planning and Zoning Commission of the City of Fairmont along with expert testimony on traffic problems at a public hearing. However, opponents did not present empirical evidence or expert testimony to substantiate their claims that property values would decrease because of the intrinsic nature of renters and increased highway traffic and overcrowding of schools. The Commission found no technical flaws in the proposal, but found that the development would not be in harmony with other subdivisions in the area, the construction would depreciate local property values, and new residents would burden the highways.

That Court found that it was improper for the Commission to consider factors of property depreciation, the development's rental nature, and the economic class of the proposed occupants under the statutory term "harmonious development" because that term lacks the specificity to notify persons seeking plat approval and the city did not specify what considerations may be considered under "harmonious development." *Id.* at 181. Therefore, adverse traffic impact was the only proper consideration for the Commission's decision.

However, after examining the testimony of the Commission's chairman, that Court found that the Commission members used their own observations of the traffic issue to deny the plat. *Id.* at 182. That

Court pointed out that the statute does not authorize Commission members to consider matters not presented to them. Therefore, that Court concluded, that the Commission members' own experiences were not sufficient to overcome the evidence of the Petitioner's traffic experts that refuted the Commission's traffic findings. *Id.* at 183. Additionally; that Court noted, "perhaps the real reason was the fact that low-income persons were going to live in the publicly-funded development," and the Commission attempted to rezone the area to prevent multi-family development in an area zoned for multi-family development. *Id.* at 184.

In the context of juries, the West Virginia Supreme Court has ruled that "[t]he testimony of expert witnesses on an issue is not exclusive and does not necessarily destroy the force or credibility of other testimony. The jury has the right to weight the testimony of all witnesses, experts and otherwise; and the same rule applies as to weight and credibility of such testimony." Syl. pt. 6, *Frye v. Kanawha Stone Company, Inc.*, 202 W. Va. 467, 505 S.E.2d 206 (1998).

As in the context of juries, the BZA should not have to believe and agree with one opinion over another opinion because an expert espouses it. The BZA may consider testimony and evidence from lay-people without violating the principles in *Kaufman*, which do not allow the BZA members to use their own observations to deny a CUP. In fact, this case is not like *Kaufman*. Here, the record shows that, although no one presented expert testimony to rebut FAF's traffic expert, the BZA did not use its own experiences to make conclusions on traffic issues.

The BZA did not focus on traffic impact on peak hours, as the traffic expert's report did, but focused on the adequacy of the physical condition of the roads. The record contains testimony, comments, pictures and official letters concerning the physical condition of the roads. Also, the record is void of any evidence that the BZA ignored FAF's traffic expert's report.

The Court cannot agree with FAF that density is not relevant or that the BZA cannot compare the proposed developments density to its neighborhood's density when determining compatibility. In a Rural District, density is the type of use rather than the amount of use. Density defines a Rural District. As the Ordinance explicitly states, "[t]he purpose of this district is to provide a location for low density single family residential development . . ." The Ordinance only allowed a density of one lot per ten acres. The Ordinance defines the Rural District based on density for the purpose of preserving the rural character of the County. The Ordinance mandates that the BZA evaluate the density of a proposed development and compare it to its surrounding neighborhood. Therefore, the Court **FINDS** that the BZA was not clearly wrong when it found density to be relevant and compared FAF's density to the surrounding neighborhoods' density. Furthermore, after examining the two pieces of evidence that the BZA used to support its conclusion that the density of the surrounding neighborhoods was much lower than FAF's proposal, the Court concludes that a reasonable mind would accept them as adequate. The aerial photograph demonstrates that FAF is obviously the densest development in its neighborhood. And "Exhibit 1" shows the average lot

size in the neighborhood being 14.56 acres as opposed to FAF's proposed 1/5th to 1/3rd acre lots. Thus, the Court **FINDS** that the BZA was not clearly wrong when it concluded the neighborhood density was much lower than FAF's density.

B. Principles of Law

FAF argues that the BZA erroneously applied the standards governing the issuance of a CUP because it did not resolve unresolved issues, used density in its evaluation of compatibility, made up a method of measuring density, and did not adequately consider FAF's LESA score. It points out that the BZA should have considered each unresolved issue individually and decided if the Ordinance required FAF to perform the request. Further, FAF argues that the BZA's discretion is limited when an applicant meets the Ordinance's requirements, which it did by proposing a single-family residential dwelling. It contends that single-family residential dwellings are compatible as a matter of law in a rural district because the Ordinance provides for their use, and if an increase in density is incompatible the purpose of the Ordinance is destroyed.

Dunleavy and Moore argue that the BZA correctly applied the standards because the Ordinance does not require the BZA to weigh one standard over another and a LESA score is only a threshold for an applicant's move to the Compatibility Assessment Meeting. They point out that the BZA considered the 26 unresolved issues that related to density or road issues and found that it could not resolve these issues in a manner that

would allow it to issue the permit that FAF wanted. Moreover, they argue that any CUP grant would include an increase in density, but the issue is whether the increase proposed is compatible with the surrounding neighborhood; therefore, comparing FAF's density to its neighborhood's density was not erroneous.

In order for an applicant to advance to the Compatibility Assessment Meeting as provided in Ordinance § 7.6, the Zoning Administrator must have given a LESA score of 55 points or less to the applicant. Once at the Compatibility Assessment Meeting, the Ordinance provides that the "standards governing the issuance of Conditional Use Permits shall be: successful LESA Point application; Board of Zoning Appeal's resolution of unresolved issues; and evidence offered by testimony and findings by the Board of Zoning Appeals that the proposed development is compatible with the neighborhood where it is proposed." Ordinance § 7.6(g) (as amended on April 8, 2005). Neighborhood is defined as "an area generally confined to a one-mile radius from the perimeter of a proposed development." Ordinance 2.2 (as amended December 10, 1998). The Board of Zoning Appeals has authority over the issuance and denial of a CUP. *Id.* The idea behind allowing a CUP is that certain uses are beneficial and are not essentially incompatible with allowed uses, but not at every location or without conditions to address special problems the use would create. *In re Petition of Skeens*, 190 W. Va. 649,441 S.E.2d 370, FN 2 (1994).

The right to a conditional use automatically exists if the BZA finds compliance with the

standards set forth in the ordinance. *In re Petition of Skeens*, 190 W. Va. at 651. The BZA's findings of fact determine whether a conditional use is consistent with the spirit, purpose, and intent of the ordinance. *Id.* The BZA must base a denial on the standards set out in the Ordinance, not on opposition of the neighboring landowners. *Id.* In that case, the Supreme Court reversed the BZA's denial because no evidence was introduced at the hearing that the requirements for the CUP were not met. No one presented evidence that Petitioner's business would substantially enhance traffic, parking, or noise.

After review of the Ordinance, the Court agrees with Dunleavy and Moore that the LESA score is simply a threshold to advance to the Compatibility Meeting. The Ordinance does not provide for the BZA to give additional weight to a passing LESA score in whole or in part. Therefore, the Court **FINDS** that is was not erroneous for the BZA refuse to consider the LESA score any further in its decision to deny the CUP.

The Court cannot agree with FAF that the BZA has a legal duty to resolve all unresolved issues. Even so, FAF admits that most of the unresolved issues concern matters that are dealt with in the subdivision process. Transcript, July 26, 2005, p. 57. Furthermore, it is the public, at the Compatibility Assessment Meeting, that creates the issues, and certain issues only stay unresolved if the applicant will not comply with the public's requests. Then it becomes an issue between the applicant and the BZA.

The Ordinance does not define what "Board of Zoning Appeal's resolution of unresolved issues" means. But, the BZA apparently interpreted this to mean that if it could not resolve the unresolved issues in a manner that would give FAF a permit that resembled what it proposed then it could not grant the CUP. The BZA concluded that it could not resolve the unresolved issues regarding density and inadequate roads, so it concluded that it could not issue the permit as proposed. Although FAF's suggestion that the BZA evaluate each unresolved issue one at a time and determine if the Ordinance requires it to comply, may be reasonable, the BZA's interpretation is also reasonable. Therefore, the Court **FINDS** the BZA did not erroneously interpret this standard.

It is reasonable for the BZA to consider density when evaluating compatibility because a Rural District is defined by density. The DRS and CUP exist to allow an applicant to develop a subdivision with a density that exceeds the maximum density allowed in a Rural District. Although single-family homes are permitted, this does not mean that if an applicant proposes the same use, the development is automatically compatible. In fact, if the Court were to follow this rationale, and not consider density, then the BZA would have to approve all increases in density in single-family home developments even if it consisted of 100 .01-acre lots. That would destroy the intent of a Rural District, which is low-density single-family residential development.

Because density is part of the definition of a Rural District, density in this case is about type of

use and not amount of use. Therefore, comparing the density of FAF to its surrounding neighbors is comparing use to use. Although averaging lot size in a neighborhood may not be the best method to compare density, it is reasonable for the BZA to use it, without the Ordinance providing for a method. Additionally, it is reasonable for the BZA to use a one-mile radius around the southeast corner to determine the boundaries of the neighborhood rather than from the perimeter, otherwise the neighborhood would extend into Maryland. The definition of "Neighborhood" uses the word "generally" to describe the boundaries. It is reasonable for the BZA to interpret this as giving it discretion to move the boundary from the perimeter when it would extend the neighborhood into another state. Therefore, the Court **FINDS** that the BZA did not erroneously find that FAF's proposed subdivision was incompatible with the surrounding neighborhood.

Conclusion

Thus, the Court **CONCLUDES AND ADJUDGES** that the BZA neither erroneously applied any principles of law nor was plainly wrong in its factual findings when it determined the FAF's LESA score and denied FAF's CUP.

ACCORDINGLY, the BZA's decisions on FAF's LESA score and CUP application are **ORDERED AFFIRMED**.

The Court notes all parties' exceptions and objections to all adverse rulings.

The Clerk shall **ENTER** this **ORDER**, and shall forward an attested copy to counsel and pro se parties of record.

ENTERED this 18th day of September, 2006.

/s/

Honorable Thomas W. Steptoe, Jr.
Judge, 23rd Circuit

BEFORE THE JEFFERSON COUNTY BOARD OF ZONING APPEALS

IN RE: CONDITIONAL USE PERMIT APPLICATION FOR FAR AWAY FARM, LLC.

FILE NO. Z04-04

ORDER DENYING CONDITIONAL USE PERMIT APPLICATION

On the 8th day of August , 2005 the Board of Zoning Appeals convened for a special session to deliberate the Condition Use Permit Application of Far Away Farm, LLC. Present at this meeting were the following Board members: Ms. Hine, Mr. Trumble, and Mr. Bresee.

The Conditional Use Permit application was filed on June 24, 2004. As a result of the application, Mr. Paul J. Raco, Director of Planning, Zoning, and Engineering gave the application a passing LESA score of 46.2 points. An appeal was made to the Board of Zoning Appeals and on February 7, 2005 the Board reversed, in part, the decision of Mr. Raco and assigned a LESA score of 50.2 which is still a passing score. On April 13, 2005 a Neighborhood Compatibility Meeting was held in the old Charles Town Library. Later, the Staff report of the Neighborhood Compatibility Meeting was released. The staff report listed 39 issues with which the developer agreed and 67 unresolved issues.

On July 26, 2005 the Board of Zoning Appeals met for a public hearing on the conditional use permit under the § 7.6(e) of the Jefferson County

Zoning Ordinance. The Board members present at that hearing were Ms. Hine, Mr. Trumble, and Mr. Bresee. After the Board agreed upon the procedure of the public meeting, the Board received public comment from several individuals including Edward Dunleavy, Henry Willard, Dan Kanopf, Beth Haney, Cynthia Rider, Fred Wells, Mimi Rogers, Janet Springstien, Gary Capriotti, Sarah Smith, Cal Becker, Blair Hughes, Dick Latteral and Ms Linda Gutsell representing the Citizens United to Save Far Away Farm, LLC. Far Away Farms, LLC was represented by Richard Gay. He along with Mark Dyck were allowed to make a presentation and given an opportunity for rebuttal At the conclusion of comment from the developer and the public, the Board scheduled the matter for a special hearing on August 8, 2005 for deliberation

Prior to entering deliberation on August 8, 2005 the Board considered the Motion to Continue Hearing on Compatibility Decision filed by Citizens United to Save Far Away Farm, LLC The Board also considered the Opposition to Motion To Continue Hearing on Compatibility Decision filed by Far Away Farm, LLC After considering the written motion and the written response thereto, the Board voted unanimously against the motion to continue and then went into deliberation

Upon returning after deliberations, Mr Bresee moved that the Board of Zoning Appeals deny the Conditional Use Permit Application for Far Away Farm, LLC

In support of this motion the Board concludes that Far Away Farms, LLC is not compatible with

the surrounding neighborhood. In support of this conclusion the Board refers to two pieces of evidence The first is an aerial photograph submitted by the developer showing the development of nearby areas with the development itself overlaid in black ink The second item the Board references is a document entitled Exhibit I bearing a stamped receipt date of July 7, 2005. This exhibit which was provided by Ms Gutsell, shows the characteristics of the neighborhood within a one mile radius of the southeast corner Far Away Farm. This document shows that there are 176 lots in this area with an average size of 14.56 acres.

The aerial photograph shows pictorially that the density of the proposed development is far in excess of anything around it. When studied more clearly it shows that the actual lot size will be 1/5 to 1/3 of an acre. By dividing the acreage of the parcel by the number of dwelling units planned, density would still be around one home per 8/10 of an acre. This aerial photograph itself shows that the development is incompatible with the surrounding neighborhood.

The second exhibit, describing the characteristics of the surrounding neighborhood shows that approximately 2,577 acres surrounding Far Away Farm has176 lots. The average lot size is then 14.56 acres. Twenty-eight of these lots are over 20 acres in size.

The Board has heard much testimony on the issue of excessive density on the parcel which is proposed for development. The staff report noted that the neighborhood compatibility meeting

contained numerous references to density problems with this development as it relates to the area surrounding this development. This difference in the density between the proposed Far Away Farm development and the homes surrounding Far Away Farm would be significant, and, in the opinion of the Board, not compatible with the neighborhood and not consistent with the Jefferson County Zoning Ordinance or the Comprehensive Plan.

In addition to denying the Conditional Use Permit because the proposed high density in not compatible with the surrounding neighborhood, the Board finds that the number of homes proposed in this development is not compatible with the roads that would serve this development and serve its surrounding neighbors. The April 13, 2005 staff report from the Neighborhood Compatibility Meeting notes approximately 17 unresolved issues related to the adequate physical condition of the roads. The developer may not be able to address all of these, but a development with much lower density may alleviate some of the problems on these roads or render them moot.

This Board understands that the standards governing the issuance of a conditional use permit shall be "a successful LESA Point application, the Board of Zoning Appeal's resolution of unresolved issues (from the compatibility assessment meeting) and evidence offered by testimony and findings by the Board of Zoning Appeals that the proposed development is compatible with the neighborhood where it is proposed." § 7.6(g) ZONING ORDINAINCE. The Board, however, cannot resolve. the unresolved issues regarding the density of the

proposed development or the inadequate roads to make Far Away Farm, LLC compatible with the neighborhood, and, at the same time, provide the developer with a permit that in any way resembles what is proposed.

Whereupon, for the reasons cited by Mr. Bresee, Mr. Trumble seconded the motion to deny the conditional use permit application for Far Away Farm, LLC. Mr. Bresee, Mr. Trumble, and Ms. Hine voted in favor of the motion. Thus, the conditional Use Permit for Far Away Farm LLC is denied.

Jefferson County Board of
Zoning Appeals

By: /s/ Tiffany Hines
Chair

Enter: 9/15/05

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of June, 2008, the following order was made and entered:

Far Away Farm, LLC, Petitioner Below,
Appellant

vs.) No. 33438

Jefferson County Board of Zoning Appeals,
a public body, Thomas Trumble, member,
Jeff Bresee, member, and Tiffany Hine,
chair, Respondents Below, Appellees

The Court, having maturely considered the petitions for rehearing filed by the appellees, Edward E. Dunleavy and Edward R. Moore, by Linda M. Gutsell, their attorney, and the Jefferson County Board of Zoning Appeals, by the Jefferson County Prosecuting Attorney and Stephanie F. Grove, Assistant Prosecutor, its attorneys is of the opinion to and doth hereby refuse said petition for rehearing.

A True Copy

Attest: /s/ Rory L. Perry, Jr.
Clerk, Supreme Court of Appeals

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1: Citizenship Rights Not to Be Abridged by States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CONSTITUTION OF THE WEST VIRGINIA

ARTICLE XIII

Section 3. Supreme court of appeals; jurisdiction and powers; officers and employees; terms.

The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari.

The court shall have appellate jurisdiction in civil cases at law where the matter in controversy, exclusive of interest and costs, is of greater value or amount than three hundred dollars unless such value or amount is increased by the Legislature; in

civil cases in equity; in controversies concerning the title or boundaries of land; in proceedings in quo warranto, habeas corpus, mandamus, prohibition and certiorari; and in cases involving personal freedom or the constitutionality of a law. It shall have appellate jurisdiction in criminal cases, where there has been a conviction for a felony or misdemeanor in a circuit court, and such appellate jurisdiction as may be conferred upon it by law where there has been such a conviction in any other court. In criminal proceedings relating to the public revenue, the right of appeal shall belong to the state as well as to the defendant. It shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.

* * * * *

THE WEST VIRGINIA CODE

§8A-8-4. County board of zoning appeals.

(b) The members of a county board of zoning appeals must be:

(1) Residents of the county for at least three years preceding his or her appointment;

(2) Cannot be a member of the county planning commission; and

(3) Cannot hold any other elective or appointive office in the county government.

§8A-9-7. Appeal from final judgment of circuit court or judge.

An appeal may be taken to the West Virginia Supreme Court of Appeals from the final judgment of the court or judge reversing, affirming or modifying the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals within the same time, in the same manner, and upon the same terms, conditions and limitations as appeals in other civil cases.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARM, LLC,

Appellant,

v.

DOCKET NO. 33438

JEFFERSON COUNTY ZONING BOARD OF APPEALS, et al.,

Appellees.

PETITION FOR REHEARING

Pursuant to Rule 24 of the Rules of Appellate Procedure, the Appellees, Edward E. Dunleavy and Edward R. Moore, by and through their counsel, Linda M. Gutsell, submit for consideration by this Honorable Court their Petition for Rehearing, directed to the final decision in this appeal issued by the Court, *per curiam*, on April 17, 2008.

Points of Law

1. Only the BZA has Legal Authority to Hear and Decide Conditional Use Permits

This Court concluded that the Board of Zoning Appeals ("BZA") lacked subject matter jurisdiction because the zoning ordinance in effect at the time of the filing of the Appellant's application for a conditional use permit ("CUP") gave the Planning Commission the authority to hear and decide CUPs.

This ruling appears to have overlooked the statutory authorizations of the zoning enabling statute, W. Va. Code § 8A-1-1, *et seq.*, which supersede the provisions of any local ordinance that are inconsistent or in conflict. *See,* Syl. Pt. 1, *The Vector Co. v. Board of Zoning Appeals of the City of Martinsburg*, 155 W.Va. 362, 184 S.E.2d 301 (1971).

Nowhere does the zoning enabling law authorize a planning commission to hear and decide CUPs under a zoning ordinance, as a planning commission's only role in zoning is as an advisor to the legislative body. *See*, W.Va. Code §§ 8A-2-1(c); 8A-2-11; 8A-3-3; 8A-5-1; 8A-7-1(a)(2).[1] The enabling statute requires any zoning ordinance enacted to create a BZA,[2] W.Va. Code § 8A-7-2(c)(1), no member of which can be a member of the planning commission, W.Va. Code § 8A-8-4, and gives only to the BZA the power to adopt rules, conduct hearings and decide matters arising under the ordinance. *See,* W.Va. Code § 8A-8-1; 8A-8-9.[3] That the power

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[1] The powers permitted to a planning commission under Chapter 8A are consistent with those granted under the prior law, Code § 8-24-1, *et seq.*, which also did not authorize planning commissions to hear and decide zoning matters such as CUPs.

[2] If planning commissions, which exist before a zoning ordinance is adopted, had the power to conduct the quasi-judicial proceedings necessary to zoning decisions, then there would be no need for the creation of a BZA.

[3] The powers permitted to a BZA under Chapter 8A are consistent with those granted under the prior law, Code § 8-24-1, *et seq.* Even if they were not, Chapter 8A would prevail, because the savings provision for pre-existing BZAs provides that they shall continue "as though established under the terms of this chapter." W.Va. Code § 8A-8-2.

of the BZA to decide CUPs is exclusive is shown by the statute's very definition of "conditional use":

> "Conditional use" means a use which because of special requirements or characteristics may be permitted in a particular zoning district *only after review by the board of zoning appeals* and upon issuance of a conditional use permit, and subject to the limitations and conditions specified in the zoning ordinance.

Emphasis added. W.Va. Code § 8A-1-2(d). Where state law gives the authority to hear and decide zoning matters to the BZA, the local legislative body cannot give that authority to a different body. 50 Op. Atty. Gen. 285 (1963).

In the past, this Court recognized that the Legislature intentionally separated subdivision control from zoning. *Singer v. Davenport,* 164 W.Va. 665, 274 S.E.2d 637, at n. 2 (1980), *citing,* 53 Op. Atty. Gen. (Aug. 13, 1969). In *Singer*, this Court acknowledged the clear distinction between the authority of planning commissions and zoning boards when it stated:

> Certainly, there is a distinction between regulating the manner in which a subdivision can be constructed and regulating where land can be devoted to subdivision use. The former is the province of a planning commission, while the latter is *exclusively* the province of a zoning commission.

Emphasis added. 164 W.Va. at 672.[4]

Jefferson County's zoning ordinance originally placed the power to decide CUPs with the BZA, as required by the enabling statute. *See*, Sec. 7.6(e), (f) and (g), Ordinance (1988), attached to the Appellant's Motion to Supplement that was filed on or about August 1, 2007, herein.[5] Why this was later changed is of no moment. The change made the Ordinance inconsistent and in conflict with the State enabling statute, and the changed provisions were of "no force and effect." Syl. Pt. 1, *Vector*, 155 W.Va. 362, 184 S.E.2d 301 (1971), and cases cited therein. State law provided the correct rule, irrespective of the terms of the local ordinance,[6] and under the applicable State law, the BZA and not the Planning Commission was required to decide the instant CUP.

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[4] While the central issue in *Singer* was the ability of the planning commission to accomplish the equivalent of zoning in the absence of a zoning ordinance, the point is undisturbed. Had there been a zoning ordinance, its administration would be the exclusive province of a zoning commission.

[5] Under the original ordinance, the Planning Commission and BZA jointly conducted the hearing, and the Planning Commission made a recommendation to the BZA. But, the decision was exclusively the BZA's.

[6] Which is why the adoption of the 2005 amendments is irrelevant to the jurisdictional analysis in this case. Even without the amendments, State law required the BZA to decide the CUP.

2. If the BZA Lacked Subject Matter Jurisdiction, then the Matter must be Remanded for Proper Proceedings and Decision

In its April 17 Opinion herein, the Court, after concluding that the BZA lacked subject matter jurisdiction, decided that the CUP must issue, based upon its own review of the record developed in the proceedings before the BZA. In so doing, the Court effectively assumed original jurisdiction over this regulatory matter, and rendered a decision upon the record developed by a tribunal which the Court had already ruled lacked subject matter jurisdiction, *ab initio*, to have entertained the cause in the first place. This part of the April 17 decision overlooks the time-honored principal of *coram non judice* and the precedents of this Court.

This Court is without original jurisdiction to decide zoning matters such as CUPs. *See*, W.V. Constitution, Art. VIII, § 3 ("The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."). This Court is granted appellate jurisdiction in enumerated civil and criminal matters, and enjoys "such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law." *Id.* Exercising its authority to confer such "other appellate jurisdiction," our Legislature has granted to this Court the power to review the final judgments of circuit courts entered upon review, on *certiorari*, of quasi-judicial zoning decisions. W.Va. Code § 8A-9-7.

If a court lacks jurisdiction, a proceeding held or a judgment rendered by it is void and of no effect – it is *coram non judice* ("before a person not a judge" – meaning that the proceeding was not a true judicial proceeding). *See, e.g., Farber v. Mazzone,* 213 W.Va. 661, 584 S.E.2d 517, at n. 5 (2003) The principle of *coram non judice* originates in the common law of England[7] and its force remains undiluted to this day. "American courts invalidated, or denied recognition to, judgments that violated this common law principle long before the Fourteenth Amendment was adopted." *Burnham v. Superior Court,* 495 U.S. 604 (1990). Subsequently, the U.S. Supreme Court held that where a court lacked personal jurisdiction, its judgment violated the Due Process Clause of the Fourteenth Amendment. *Pennoyer v. Neff,* 95 U.S. 714, 732 (1878).

If it becomes apparent to a tribunal that it lacks jurisdiction, its only authority is to dismiss the proceeding, anything else done being *coram non judice*, and having no efficacy whatsoever. *See, e.g.,* Syl. Pt. 4, *Cobb v. Cobb,* 145 W.Va. 107, 113 S.E.2d 193 (1960); *Nutter v. Brown,* 58 W.Va. 237, 245, 52 S.E. 88 (1905); *Twiggs v. Chevallie,* 4 W.Va. 463, 473 (1870). Where jurisdiction is lacking, the entire proceedings, not just the judgment, are *coram non judice* and of no effect. *See, e.g., State v. Valentine,* 90 W.Va. 35, 38, 110 S.E. 445, 446 (1922)(such proceedings are of no effect, and "must be regarded *as if nothing had been done.*" Emphasis added.). *See*

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[7] The U.S. Supreme Court suggests that the principle can be traced to 1482, and was made settled law in the Case of the Marshalsea, 10 Co.Rep. 68b, 77 Eng.Rep. 1027, 1041 (K.B. 1612). *Burnham v. Superior Court,* 495 U.S. 604 (1990).

also, O'Connell v. U.S., 253 U.S. 142 (1920)(where the lower court had been divested of jurisdiction, the bill later received into the record was of no effect, and the Court on appeal *could not even consider it*).

If, as the Court herein ruled, the BZA lacked subject matter jurisdiction to hear and decide the CUP, then the proceedings held by the BZA, as well as the decision rendered by it, are *coram non judice*, and of no effect whatsoever. It is "as if nothing had been done." *Valentine*, 90 W.Va. 35, 38. Because the BZA's decision is void,[8] there is nothing for this Court to review, within the limited scope of its appellate jurisdiction, with respect to the BZA's underlying findings and conclusions. Because the proceedings before the BZA are a nullity and of no effect, there is no valid record of evidence upon which this Court could have weighed the evidence, decided the facts, applied the law to the facts and rendered the ruling on its own initiative that the CUP must issue.[9] The only outcome consistent with the Court's appellate jurisdiction would have been to vacate the decisions below and remand with directions that the matter be referred to the Planning Commission for a valid hearing and decision.

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[8] As noted by the Court in its Opinion herein, citing numerous cases not repeated here. Opinion at p. 9.

[9] Opinion, pp. 13-17. This is not a case where, at some stage in the proceedings below, a valid record was developed.

3. Fundamental Due Process Entitles these Appellees To be Heard by a Tribunal of Competent Jurisdiction

These Appellees have sufficient interest in the potential grant of the special exception[10] to have standing to challenge the developer's asserted eligibility for the CUP, and their interest entitles them to the procedural due process provided by the law and the Ordinance for the determination of the question.

This Court has previously recognized that "all members of the public have an interest in the constitutionality, regularity and validity of the municipal ordinances that govern their affairs." *Kisner v. City of Fairmont,* 166 W.Va. 145, 148, 272 S.E.2d 673 (1980).[11] *In accord, see, Tug Valley Recovery Center, Inc. v. Mingo County Commission,* 164 W.Va. 94, 261 S.E.2d 165 (1979)(property tax assessments). In *Corliss v. Jefferson County Bd. of Zoning Appeals,* 214 W.Va. 535, 591 S.E.2d 93 (2003), this Court held that an "aggrieved person" with standing to appeal a decision of a BZA is one who has shown that he will suffer an injury separate and apart from that of the general public. *Id.* at Syl. Pt. 6.

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[10] A "special exception" is another term for a "conditional use." *Harding v. Bd. of Zoning Appeals of the City of Morgantown,* 159 W.Va. 73, 77, 219 S.E.2d 324 (1975).

[11] In *Kisner,* persons in the building business were found to have standing to challenge the validity of the city's building code ordinance.

County-wide zoning, such as exists in Jefferson County, is a local ordinance in which all members of the public are interested in the constitutionality, regularity and validity of its administration. Nonetheless, it cannot be gainsaid that persons residing within the immediate vicinity of a property under consideration for a CUP have a greater interest in the propriety of the decision than does the public at large, due to the impact that the special use may have on their continued use and enjoyment of their own properties. These interests are identified and protected in the 2004 revision of the State's zoning enabling statute.

The Legislature has provided that any aggrieved person may appeal the decision of a BZA, W.Va. Code § 8A-9-1(b), and that an adverse party (any person who appeared in opposition at the hearing before the BZA) is entitled to notice of the appeal. W.Va. Code § 8A-9-2(a)(1) and (b). The enabling statute defines an aggrieved person as is one who "will suffer a peculiar injury, prejudice or inconvenience beyond that which other residents of the county or municipality may suffer." W.Va. Code § 8A-1-2(b).

These Appellees[12] appeared at the BZA hearing as parties adverse to the developer's application, and presented evidence of the peculiar injury and inconvenience that they would suffer if the CUP were issued, particularly with respect to

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[12] Mr. Moore owns and lives on a parcel adjacent to the subject site. Mr. Dunleavy is a common interest owner of a parcel confronting the subject site, and owns and lives on the parcel immediately adjacent to the common interest parcel.

the introduction of new and enhanced hazards on the already inadequate and dangerous road that provides their only route of travel to and from their homes.[13] Their interests entitled them to the protections of the processes that are due under the statutory and regulatory scheme for CUP decisions. Fundamental to the concept of due process is the right to be heard by a tribunal of competent jurisdiction. *See. e.g., Campbell v. Wyant,* 26 W.Va. 702, 707 (1885)(acknowledging that due process is "only upon a hearing of the parties in a court of competent jurisdiction."). A hearing that is *coram non judice* is no hearing at all, and cannot satisfy fundamental due process.

If, as this Court held in its April 17 Opinion, the BZA did not have subject matter jurisdiction to hear and decide the CUP application, then these Appellees have not had a hearing by a court of competent jurisdiction on their opposition to the CUP's issuance, and have been deprived of the right to protect their interests in a competent forum. The hearing before this Court does not cure this defect because, as noted previously herein, this Court has only appellate jurisdiction over this matter and, lacking original jurisdiction, cannot decide the issue in the first instance. If, as this Court held, the Planning Commission is the body that was required to hear the matter, then these Appellees are entitled to a hearing in that forum before being required to

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[13] The peculiar interest of a landowner in the continued and unfettered access to the street abutting his property, or which furnishes the only means of access to his property, was acknowledged by this Court in *Baker v. City of Charleston,* 134 W.Va. 754, 61 S.E.2d 743 (1950).

defend their opposition in an appellate review in this Court. The ruling of this Court deprives these Appellees of the right to the most fundamental aspect of due process – hearing by a competent court.

4. The Limits of Appellate Jurisdiction Preclude Independent Fact-Finding and Decision-Making

Appellate jurisdiction is limited to review of the order entered below. If the BZA lacked subject matter jurisdiction to entertain the CUP application, then, as discussed above and as concluded by this Court,[14] its decision on the CUP was void and of no effect. The Circuit Court's Order affirming the BZA decision was in error on the basis of the jurisdictional issue alone, and subject to reversal or vacation on that basis. The underlying factual justifications for the BZA's determination are of no moment, because no legitimate record was developed below. There is no valid original determination of the Appellant's eligibility for the CUP, nothing to review for factual and legal errors, and no occasion for this Court, acting pursuant to its appellate jurisdiction, to have made an original determination on its own initiative. This Court has previously explained this rule:

> It is essential that there has been a decision of an inferior court, since an appellate court is, on appeal, a court of review and not a court of first instance, exercising jurisdiction only in reviewing the rulings of the trial court, and being

[14] Opinion of April 17, herein, at p. 9.

> limited to review of the judgment, order, or decree of the court from which the appeal is taken.

City of Huntington v. Chesapeake & Potomac Telephone Co., 154 W.Va. 634, 639,177 S.E.2d 591, 595 (1971), *quoting*, 4 C.J.S. *Appeal and Error*, Section 39 at page 152. *See, also*, Syl. Pt. 1, *Western Auto Supply Co. v. Dillard*, 153 W.Va. 678, 172 S.E.2d 388 (1970).

If, however, this Court, upon re-examination, concludes that the BZA did possess subject matter jurisdiction to determine the approval or denial of the CUP sought, then the applicable standard of review precludes the independent weighing of evidence, finding of facts and making of conclusions. A reviewing court may disturb the decision of a zoning appeals board only "where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond the scope of its jurisdiction." *Wolfe v. Forbes*, 159 W. Va. at 45, 217 S.E.2d at 906. Under this deferential standard of review, it is not grounds for reversal that the Court might have weighed the evidence differently, so long as substantial evidence exists to support the BZA's findings. "Neither this Court nor the circuit court may supplant a factual finding ... merely by identifying an alternative conclusion that could be supported by substantial evidence." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483 (1996).

There was substantial evidence to support the BZA's determination that the road was inadequate, which was not merely the "anecdotal experiences"[15]

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[15] April 17, 2008, Opinion at p. 15-16.

of neighbors, as characterized by the Appellant. The classification and level of service records from the West Virginia Department of Transportation, Division of Highways, are not "anecdotal" reports of neighbors. The road's accident records from the Division of Highways are not "anecdotal" reports of neighbors. The written verification from the Transportation Director of the Jefferson County Board of Education that its school buses are not permitted on portions of the road due to its inadequacy is not an "anecdotal" report of neighbors. The photographs showing the condition of the road are not "anecdotal" reports of neighbors. All of this non-anecdotal evidence was presented to the BZA, and provided the substantial evidence necessary to sustain its determination that the road is inadequate, even if this Court would have weighed the evidence differently. The inadequacy of the road alone was a sufficient basis for the denial of the CUP.

Neither the BZA nor the Circuit Court rendered a ruling on whether or not the subject site is historic, and, there was no such ruling for this Court to review. The eligibility assessment of sites for entry upon the National Register of Historic Places is dictated by the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*) and the corresponding State Act (W.Va. Code § 29-1-8, 8a and 8b, incorporating the National Act), no provision of which authorizes this, or any court, to make such determination. Pursuant to the eligibility processes provided by the historic preservation laws, however, it has been determined by the proper officials that the subject site was at the core of the Battle of

Shepherdstown. *See,* Eligibility Determination, attached hereto as Ex. 1.[16]

5. This Court Lacked the Personal Jurisdiction over the Planning Commission Necessary to Order it to Issue the CUP

The Planning Commission was not a party to the proceedings below or in this Court.[17] Accordingly, this Court never acquired *in personam* jurisdiction over the Planning Commission. Personal jurisdiction being indispensible to the inclusion of any person or entity within the scope of a court's order, the ultimate mandate that the Planning Commission issue the CUP is without effect. As noted above, if a court lacks personal jurisdiction, its judgment against a party violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878), and is void as *coram non judice.*

It cannot be said that the personal jurisdiction over the BZA herein is the equivalent of jurisdiction over the Planning Commission, as the Planning Commission is not a "part of" the BZA, but a separately constituted entity with the power to

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[16] The subject site, then owned by Osbourne, is shown on the map as the location of the troops commanded by Pender, Gregg, Lane and Archer and A.P. Hill.

[17] Which is particularly unfortunate, given that the Planning Commission is in the unique position to be able to disprove the misunderstanding about the intended application of the 2005 amendments.

appear in legal matters in its own name, and with which the BZA has no vicarious or surrogate relationship. And, the Jefferson County Planning Commission is not, as some refer to it, the "Planning and Zoning Commission," as evidenced by its official seal, shown at left.

Conclusion

The Opinion of April 17, 2008, in this appeal indicates that this Court overlooked or misapprehended significant points of established law and facts appearing in the record. The points of law that may have been overlooked include those of Constitutional proportion. As a result, if allowed to stand, the Opinion and any mandate issuing therefrom will be unenforceable and open to collateral attack, and will further deprive these Appellees of substantial due process rights. These Appellees respectfully petition for rehearing in this appeal.

EDWARD E. DUNLEAVY, et al.,
Appellees,
By counsel.

/s/
Linda M. Gutsell (WVSB No. 5774)
Attorney at Law
116 West Washington Street, Suite 2A
Charles Town, WV 25414

CERTIFICATE OF SERVICE

I, Linda M. Gutsell, counsel for Edward E. Dunleavy and Edward R. Moore, certify that I have served the foregoing PETITION FOR REHEARING upon the Appellant and Appellee by mailing a true and accurate copy thereof by the US mail, first-class postage prepaid, to counsel for said parties, at the addresses shown below, this 16th day of May, 2008

Stephanie Grove, Esq.
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/s/
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EXHIBIT 1

August 11, 2005

WEST VIRGINIA
DIVISION OF
CULTURE & HISTORY
1900 Kanawha Blvd., E.
Charleston, WV
25305-0300
Phone 304.558.0220
Fax 304.558.2779
TDD 304.558.3562
www.wvculture.org

Mr. Edward Dunleavy, President
The Shepherdstown Battlefield
Preservation Association
P0 Box 3359
Shepherdstown, WV 25443

Re: *National Register Eligibility of the Battle of Shepherdstown, Jefferson County, West Virginia.*

Dear Mr. Dunleavy:

What follows is a National Register of Historic Places eligibility assessment for the area associated with the Battle of Shepherdstown, a rear-guard action fought on September 19 and 20, 1862 following the close of activities associated with the Battle of Antietam. We find that the Battle of Shepherdstown should be considered eligible inclusion in the National Register under Criterion A for its direct association with the halt of the Union pursuit of the retreating Confederate army.

On-site investigation of the area covered territory roughly along the north-south axis of the Trough Road, from its terminus at the Potomac River in the north, to its intersection with Engle-Moler Road in the south. In addition, the locus of activity at the cement mill was viewed from both the West Virginia and Maryland sides of the Potomac River.

Generally speaking, the battlefield landscape is a patchwork of wooded river banks, open fields,

wood lots, historic period buildings, and scattered modern single family house developments. With all of the landscape factors taken into consideration in our opinion that the battlefield has retained sufficient physical integrity necessary for recognition in the National Register. This opinion is made in full recognition of the fact that battlefields change through time. While the insertion of single family houses on large lots do constitute demerits to the area's historic integrity, the cumulative impact to the landscape is not severe. The balance of the territory associated with the battle either remains in agricultural use or supports woodlands. This evaluation follows guidance for evaluating the integrity of battlefields as stated in the National Park Service publications *Study of Civil War Sites in the Shenandoah Valley of Virginia* and *Bulletin 40: Guidelines for Identifying, Evaluating, and Registering America's Historic Battlefields.*

The National Register boundary for the battle must be determined with careful review of the scholarship conducted on the movements of Union and Confederate forces during the battle. It is possible, however, to draw a simple boundary that encloses the main known areas of attack and defense. Historic accounts identify territory associated with the battle that includes Union cannon emplacements in Maryland on the bluffs overlooking the river to a corridor of land that stretches from the cement mill cliffs on the West Virginia side of the river south nearly to Engle-Moler Road. Please refer to the attached topographical map to view the area identified by the National Park Service as the core study area, and the rectangle that has been superimposed on the map to represent a working National Register boundary study. The exact edges of this speculative boundary could change upon comparing scholarly knowledge of the haute with conditions on the ground, but the area enclosed by the rectangle is

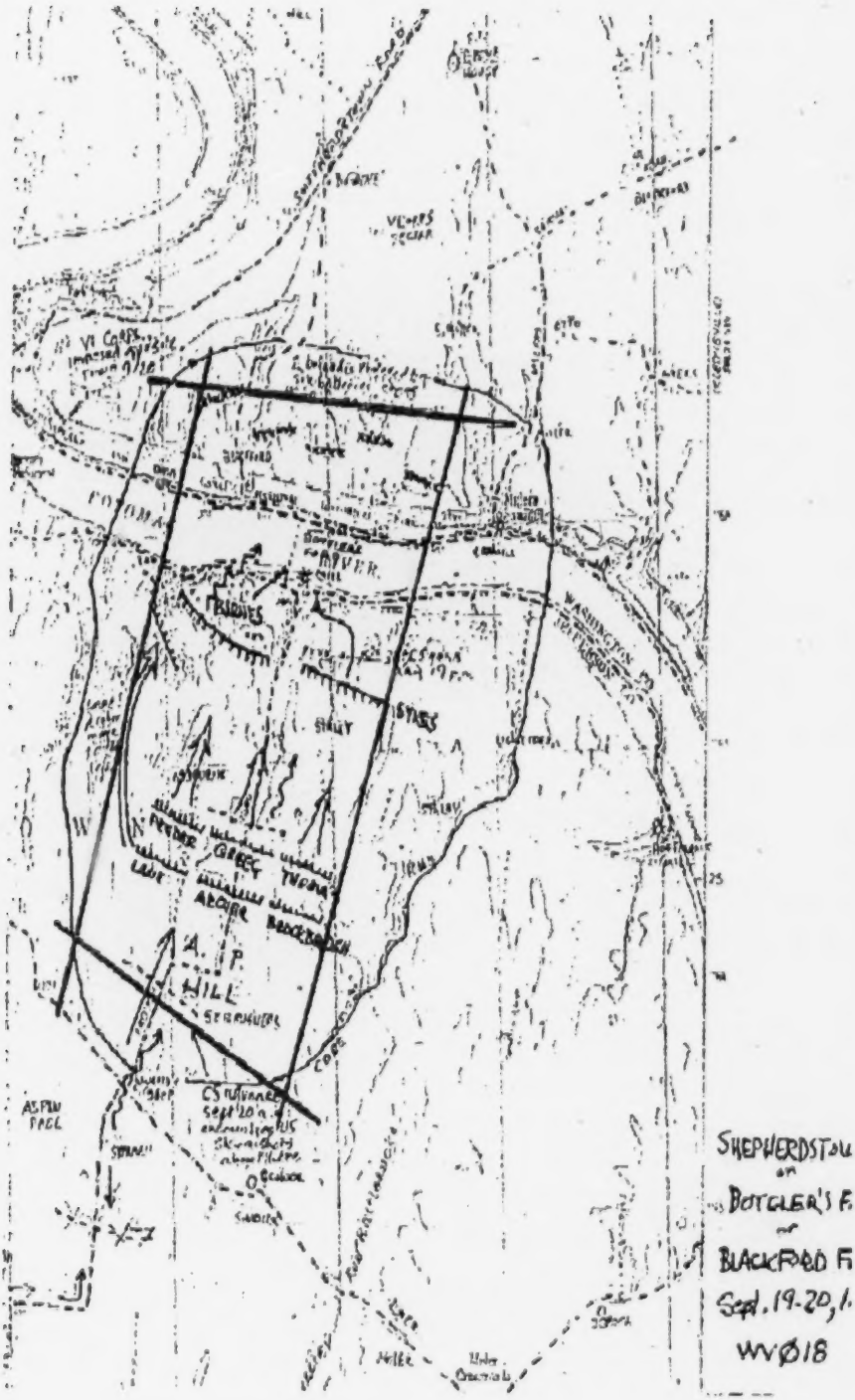
considered the absolute minimum necessary for the proper recognition of the events that took place between September 19 and 20, 1862.

Detailed instructions for pursuing the completion of a National Register registration form for the battle shall be mailed to you under separate cover. If you have questions upon your review of this letter, please do not hesitate to contact me.

Sincerely,

/S/
Alan R. Rowe
National Register and Survey Coordinator

Enclosure


VI CORPS
RIVER
FRIENDS
SYKES
A. P.
HILL
SHEPHERDSTOWN
BOTGLER'S F.
BLACKFORD F.
Sept. 19-20, 1.
WV018

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARMS, LLC,

Appellant,

v.

DOCKET NO.33438

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,

Appellees.

PETITION FOR REHEARING

Comes now, the Jefferson County Board of Zoning Appeals, by and through counsel, Stephanie F. Grove, Assistant Prosecutor, pursuant to Rule 24 of the Rules of Appellate Procedure, to present a Petition for Rehearing, concerning the final decision rendered by this Honorable Court, in this appeal, issued, *per curiam,* on April 17, 2008.

Points of Law

I. The Enabling Legislation Does not Grant the Planning Commission Jurisdiction to Hear and Decide Conditional Uses

In its April 17, 2008 decision, the Court found the Board of Zoning Appeals lacked the subject matter jurisdiction to hear and decide the Far Away Farms conditional use permit because the zoning ordinance in effect provided that the Planning

Commission was the body charged with issuing CUPs. However, the enabling legislation codified in West Virginia Code 8A-1-1 *et seq.*, permits only the Board of Zoning Appeals to hear and decide conditional uses. Further, pursuant to this Court's holding in Vector Co. v. Board of Zoning Appeals of the City of Martinsburg, *155* W.Va. 362, 184 S.E.2d 301, the provisions of the enabling legislation supersede any provisions of the local zoning ordinance which are inconsistent. "When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect." *Id.* at Syl. Pt. 1. Therefore, because the West Virginia Code expressly grants the authority to hear and decide conditional uses to the BZA, the BZA did possess subject matter jurisdiction and the provisions in the Jefferson County Zoning Ordinance granting the Planning Commission the authority to issue CUPs are of no force or effect.

West Virginia Code 8A-1-1 *et seq.* clearly permits only the BZA to hear and decide conditional uses. Even though the Jefferson County Zoning Ordinance was adopted under the prior enabling legislation codified at W.Va. Code 8-24-1 *et seq.*, the provisions of Chapter 8A apply to the code pursuant to W.Va. Code § 8A-8-2. "A board of zoning appeals established prior to the effective date of this chapter shall continue to operate ***as though established under the terms of this chapter.*** All actions lawfully taken under prior acts are hereby validated and continued in effect until amended or repealed by action taken under the authority of this chapter." (emphasis added.) Therefore, the provisions of the Chapter 8A of the West Virginia Code are apply the

Jefferson County BZA, even though that body was established under the prior enabling legislation. As such, the BZA must comply with the provisions of Chapter 8A.

West Virginia Code 8A-1-2(d) defines a conditional use as "a use which because of special requirements or characteristics may be permitted in a particular zoning district ***only after review by the board of zoning appeals*** and upon issuance of a conditional use permit, and subject to the limitations and conditions specified in the zoning ordinance." (emphasis added.) Thus, by definition, a conditional use must be granted by the BZA. In addition, the statute goes on to enumerate the powers of a board of zoning appeals, which include the granting of CUPs. First, the code requires that if a governing body adopts a zoning ordinance, then as part of that zoning ordinance it shall create a board of zoning appeals to hear appeals on zoning issues. *See* W.Va. Code § 8A-8-1. Further, West Virginia Code 8A-8-9 provides in pertinent part that "[a] board of zoning appeals has the following powers and duties: hear and decide conditional uses of the zoning ordinance upon which the board is required to act under the zoning ordinance and adopt rules and regulations concerning applications for variance and conditional uses."

Finally, it is clear that the Planning Commission has not been granted the authority to hear and decide conditional uses. This Court has previously outlined the distinction between planning and zoning. "Zoning is concerned with whether a certain area of a community may be used for a particular purpose while planning involves hoe that

use is undertaken." *Syl. Pt. 1, Kaufman v. the Planning and Zoning Commission of the City of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148. In *Kaufman*, the court went on to note that the Planning Commission does not have the authority to rezone property. ". . .[A] planning commission may not use its authority to effectively rezone property by denying approval of a subdivision plat." *Id.* at 184. In conformance with this separation between planning and zoning, Chapter 8A grants the Planning Commission limited zoning power which power consists of a purely advisory role during the implementation or amendment of a zoning ordinance by the governing body. *See* W.Va. Code § § 8A-7-4 and 8A-7-8. Further, the section of the code that enumerates the powers of a planning commission only grants a planning commission jurisdiction to approve subdivision applications and prepare a comprehensive plan for the governing body. W.Va. Code § § 8A-2-l 1; 8A-3-3; and 8A-5-1. Chapter 8A never provides a Planning Commission with the authority to rule on zoning matters and it certainly never provides it with the jurisdiction to hear and decide conditional uses, which jurisdiction is specifically granted to a board of zoning appeals.

II. The Court Did Not Possess Personal Jurisdiction Over the Planning Commission

The Planning Commission was not a party to the proceedings before the BZA, Circuit Court, or in this Court. As such, this Court never acquired personal jurisdiction over the Planning Commission, which personal jurisdiction is essential in order for the court to mandate that the Planning Commission

grant the Far Away Farm's CUP. As previously noted, the BZA and the Planning Commission are two separate entities possessing distinct and separate powers and duties. As such, personal jurisdiction over the Board of Zoning Appeals, which hears and decides zoning matters, does not confer personal jurisdiction over the Planning Commission, which hears and decides subdivision matters and advises the governing body. "It is well settled that the issuance and service of process in the manner prescribed by law, unless waived, is essential to the jurisdiction of all courts. It is the fact of service which gives the court jurisdiction." *Bowers v. Wurzburg*, 205 W.Va. 450, 457 *n.5,* 519 S.E.2d 148, *155* n. *5.* Because the court lacked personal jurisdiction, it lacks the authority to order the Planning Commission, which never received service of process, to issue the CUP.

Conclusion

The Board of Zoning Appeals heard the Far Away Farms CUP application in the first instance because the enabling legislation codified at W.Va, Code 8A-1 -1 *et seq.*, grants the BZA the exclusive jurisdiction to hear and decide conditional uses. Therefore, even though the Jefferson County Zoning Ordinance granted the Planning Commission such jurisdiction, the provisions of the statute prevail over the provisions of the Jefferson County Zoning Ordinance. Therefore, the BZA did possess the subject matter jurisdiction to hear and decide the conditional use permit. Further, even if the BZA did not have subject matter jurisdiction, this Court lacked personal jurisdiction over the Planning Commission to order it to issue the CUP. The

Jefferson County Board of Zoning Appeals respectfully request that the Court consider the points of law presented herein and grant the Petition for Rehearing.

JEFFERSON COUNTY BOARD
OF ZONING APPEALS,
Appellees
By Counsel:

/s/
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARMS, LLC,
Appellant,

DOCKET NO. 33438

JEFFERSON COUNTY BOARD
OF ZONING APPEALS,
Appellees.

CERTIFICATE OF SERVICE

I, Stephanie F. Grove, do hereby certify that on this 19th day of May, 2008, that I have served a true copy of the foregoing *PETITION FOR REHEARING* upon the following by first class United States Mail addressed as follows:

Richard G. Gay, Esq.
81 Congress Street
Berkeley Springs, WV 25411

Linda M. Gutsell
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/s/
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